COPY

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

In Re	)	No. S124660
	)	
RENO,	)	DEATH PENALTY CASE
	)	
On Habeas Corpus	)	
	)	

PETITION FOR WRIT OF HABEAS CORPUS

PETER GIANNINI, No. 61257
GIANNINI & CAMPBELL
12304 Santa Monica Blvd. #105
Los Angeles, CA 90025
Telephone: (310) 207-5772

JAMES S. THOMSON, No. 79658
SAOR E. STETLER, No. 194978
THOMSON & STETLER
Criminal Defense Attorneys
819 Delaware Street
Berkeley, California 94710
Telephone: (510) 525-9123

Attorneys for Petitioner
RENO

TABLE OF CONTENTS

Petitioner RENO, currently confined on death row at the California State Prison at San Quentin, petitions this Court through undersigned counsel to issue a writ of habeas corpus ordering that his conviction for capital murder and his sentence of death be vacated. In support thereof, petitioner would show this Court as follows:

I. INTRODUCTION.

Mr. Reno[1] is 58 years old. He has been incarcerated for over twenty-five years for two homicides occurring in 1976 and one homicide occurring in 1978.

Mr. Reno was tried, convicted and sentenced to death during the time period of 1978 to 1980. The convictions were reversed by this Court in 1985. Mr. Reno was retried and sentenced to death in 1987. On a second appeal, this Court upheld Mr. Reno's conviction and death sentence in 1995.

The 1976 homicides involved the killing of Scott Fowler, age 12; and Ralph Chavez, age 10. They had been night fishing at Ford Park Lake, in Bell Gardens, California. Fowler and Chavez were last seen with two men, one of whom rode a motorcycle. No one identified petitioner as being either one of these two men.

In the two years following the killings, the police developed considerable evidence supporting the "two-killer" theory and pointing to a number of possible suspects. However, the police never arrested anyone on these murder charges. Mr. Reno was never considered a suspect in these killings. This "two-killer" or "alternative suspect" evidence included:

---

[1] On December 14, 1994, the Marin County Superior Court granted Mr. Reno's petition for change of name from Harold R. Memro to Reno. Exhibit A.

- the "positive identification" of Charles Lohman as one of the killers;
- statements of witnesses to whom potential suspects had confessed;
- Scott Fowler's brother's statement that the killings could not have been committed by a single killer, and his offer to testify against Nick Allikas, an older man who had had sexual relations with the Fowler boys and who had been with them on the day of the killings; and
- evidence of sightings at the park of a motorcycle very different from Mr. Reno's.

The 1978 homicide involved the killing of Carl Carter, Jr., age 7. He was reported missing from his home in South Gate, California. Carter was last seen with his older brother.

The Bell Gardens Police investigating officer Don Barclift withheld over 400 pages of exculpatory evidence concerning the 1976 homicides from the defense until six years after the first trial and just two months before the second trial. To this day, the state has failed to release all of the exculpatory evidence concerning the 1976 homicides. Though the 400 pages contained crucial evidence regarding witnesses, other suspects, and basic factual information regarding the 1976 homicides, Bell Gardens Police Officer Barclift stated that the evidence was "irrelevant."

By the time it was turned over in 1986, the "trail was too cold," and the evidence lost value to the defense as a decade had passed since the killing and investigation. Had the exculpatory evidence been provided earlier, defense counsel would have been able to

investigate the many other suspects and attack the prosecution's case. Moreover, given that lingering doubt was an important mitigation issue, a more thorough and timely investigation of the information in the discovery materials would have provided the jury the necessary evidence to make a fair and reliable determination of penalty.

Had the evidence been turned over when ordered, trial counsel would have learned that Suspect One, of whom a composite sketch was created and circulated, had been seen at the park on the night of the killings by witnesses Jose Feliciano, Scott Bushea and Mary Bushea. They all saw Suspect One at the park in the week prior to the night of the murder. Jose Feliciano and Scott Bushea saw both suspects fishing at the park earlier that week. Audie Cullison was fishing with Scott Fowler on the Wednesday before the murders. At that time, Suspect One approached, spoke to them, and then stood and stared at Scott Fowler for about five minutes before finally walking away. Suspect One was described as having sandy blond, shoulder length hair, with a conspicuous scar across his right cheek. He was seen wearing an army jacket on the night of the killing.

The scar was noticeable and played a major role in investigating alternate suspects. Five potential suspects were released because they did not have the requisite scar on their cheek: Joseph Daniel Arozena; Donald Johnson; William Ernest Burley; Ralph Wilbur Baker; and Raymond Minick.

When Jose Feliciano and his friend Scott Bushea were at the park earlier that week they saw both suspects. Suspect Two arrived at the park wearing a brown jacket and riding a motorcycle. Suspect Two spoke with Scott Bushea. Suspect Two was described as having

brown, wavy hair, slightly chubby and possibly Hispanic.

Neither suspects' description resembled petitioner. Mr. Reno has dark hair and no scars on either cheek. His police booking slip in 1978 stated that no scars were visible. "Marks, scars and deformities: n/v". A 1972 arrest report only lists "Fu Man Chu mustache" under 'marks and scars.' And, unlike Suspect Two, Mr. Reno is not Hispanic.

Sadly, the state's misconduct was not limited to withholding exculpatory evidence. As the state conceded, law enforcement made a warrantless arrest of Mr. Reno and conducted a warrantless search of his house and surrounding area and a warrantless search of his car. The arresting officers did not entertain a subjective belief that petitioner was guilty of an offense and, even if they had, the circumstances known to the officers failed to establish probable cause to arrest Mr. Reno.

After being twice interviewed by police, petitioner was arrested for "investigation" of kidnaping Carter. Then after obtaining a coerced confession as to each of the killings, Mr. Reno was also charged with the 1976 killings though no physical evidence connected him to the crime scene or to the killings. However, Mr. Reno's "confession" was involuntary and false. As such, it should have been suppressed by the trial court.

Mr Reno was interrogated by Bell Gardens Police Officer Greene. Greene was described as a large man, a bodybuilder with "huge" arms, who had previously coerced confessions and had twice broken the jaws of detainees in minor traffic stops.

During the interrogation, Greene threatened to shove petitioner's head into a wall of the interrogation room if he did not "cooperate." Completely independent arrestees on

other charges testified that Green had exhibited this exact behavior towards them. The police did not refute, and in fact corroborated the testimony regarding their mistreatment of these other arrestees. Indeed, the hole in the wall (repaired the same day defense counsel requested to see it) demonstrated the seriousness of the physical threat made against Mr. Reno.

From the moment of his arrest, it was evident that the police wanted a confession to their unsolved crimes. As a result, petitioner's alleged confessions were obtained by the exploitation of the illegality of his arrest. The confessions were procured during extensive interrogation after petitioner had been illegally arrested and immediately detained in isolation for more than six hours. Mr. Reno was cut off from the outside world. Furthermore, there were no intervening circumstances other than prolonged incarceration and interrogation, between the illegal arrest and the confession.

Here, the officers schemed to extract a confession at all costs. Four officers were present at times in a very small interrogation room.

- Officer Lloyd Carter was introduced to Mr. Reno as the "boss man."
- Carter had been chosen to conduct the interrogation because of his experience "extracting" information from suspects.
- Carter in turn explained to Mr. Reno that Greene had been hired for his "muscles."
- Carter told Mr. Reno that Greene would probably kill him in a fight unless restrained.

- Greene told Mr. Reno that he knew how to get answers to questions.
- The indentation in the wall was pointed out to petitioner by his interrogators.
- Mr. Reno was asked if he would like to make a matching impression with his head.
- The interrogators made other comments about the indentation in the wall.
- Greene flexed his muscles menacingly throughout the interrogation.
- The interrogators threatened Mr. Reno with physical harm by other prisoners due to the nature of the crimes.

In addition to the threat of physical force, the officers engaged in significant psychological coercion of petitioner. The officers made an offer of psychiatric treatment in response to petitioner's request to be returned to Atascadero State Mental Hospital.[2] They agreed that he was mentally ill and promised him treatment at Atascadero Hospital if he "cooperated." They also told him that he would be allowed to meet with a friend, Linda Brundige, a reserve deputy sheriff who lived nearby. But after Mr. Reno spoke with her and she agreed to meet him at the station, the interrogators told him that they would not allow the meeting further enforcing his isolation and helplessness.

Prior to this interrogation, petitioner had been interviewed out of custody twice. Each time he had denied any involvement in the crimes. He offered to submit to a polygraph examination and was taken to the police station under a false impression that an

---

[2] Petitioner had been previously admitted to Atascadero State Mental Hospital for three years between September 1972 and November 1974.

examination would be given. Instead, following multiple lengthy custodial interrogations, an officer's promise to aid his return to a mental hospital in exchange for his cooperation and after being promised, then denied, an opportunity to see and speak with his friend Linda Brundige, petitioner, in tears and in an extremely emotional state, succumbed to the officers demand and then "confessed."

Here, the evidence points to the inescapable conclusion that petitioner's confession was not freely and voluntarily given. The coercive, isolated atmosphere in which petitioner was confronted with items taken from his apartment in an illegal search and with the presence of four officers in a small room, coupled with the fact that he was physically threatened by Officer Greene, with repeated references to the dent in the wall, render his confession involuntary.

An examination of the circumstances surrounding the interrogation of petitioner—including the unrefuted, independently corroborative testimony of witnesses describing systemic misconduct by the South Gate Police Department—reveals a coerced confession. As such, the jury should never have heard this untrustworthy and false confession. Needless to say, it played the deciding role in the guilty verdicts and the death sentence.

This Court's first decision reversed petitioner's conviction and sentence based on police and prosecutor misconduct at trial, including the withholding of relevant evidence on whether petitioner's confessions were coerced. The material withheld was evidence as to the records of misconduct of the investigating officers. This Court concluded that

withholding that evidence was prejudicial both as to the admissibility of the confessions and as to their reliability, assuming they were admitted. *People v. Memro I*, 38 Cal. 3d 658, 684 (1985).

Shortly before this Court's decision reversing the conviction, the City of South Gate destroyed the evidence that was the subject of the court's pending decision. Consequently, petitioner was unable to obtain the evidence on which the court had reversed his conviction and sentence of death. Thus, Mr. Reno was not able to use this evidence to prove that his confession was involuntary.

While the first trial was conducted by a Los Angeles County Superior Court judge without a jury, following remand from this Court, the second trial was presided over by a court commissioner, John A. Torribio, with a jury. The commissioner lacked felony trial experience, let alone capital trial experience, and was biased against petitioner due to his sexual orientation and his desire to take part in his defense and assist counsel in his defense.

On remand for the second trial, petitioner renewed his motion to suppress, but, because the police had destroyed the personnel files, petitioner did not have the police files that this Court had based the reversal upon. In rebuttal to the argument justifying suppression, the prosecution offered testimony of the interrogating officers that the confession had not been coerced, and also presented the testimony of professional informant Anthony Cornejo as to an alleged statement petitioner had made in jail after the reversal of his case and prior to the second trial, purportedly admitting that Mr. Reno was

guilty and that the coerced confession issue was contrived. The trial court denied the suppression motion, stating that it was doing so in reliance upon the prosecution witnesses.

Cornejo was at the time a frequently used jailhouse informant and was acting as an agent for the police when he allegedly obtained this statement from petitioner. He had on a regular basis obtained or created "confessions" from defendants in return for favors from prosecutors and jailers for at least eight years prior to his testimony in this case. He was part of a group of Los Angeles County Mens' Jail informants who regularly solicited "designer confessions" from other inmates or, failing that, simply manufactured them to gain favors or freedom on their own pending cases. As one prosecutor noted, upon learning that Cornejo had perjured himself in the Ash prosecution in Pasadena, "Cornejo is without a doubt one of the most unscrupulous snitches that I have ever run across in 14 years as a deputy district attorney."

Another serious error arose when this Court remanded the case without instructions on the proper scope of the permissible charges. Despite the acquittal at the first trial, petitioner stood trial on both theories of first-degree murder, at least one of which had previously been found "not true." The retrial on both theories resulted in petitioner's conviction and sentence resting on predicate facts that were rejected by the original fact finder and a theory of first-degree murder of which he was acquitted in the first trial. This combination of errors requires the granting of the habeas petition as to the Carter homicide because it violated several of Mr. Reno's constitutional rights.

At the first trial, the prosecutor sought to obtain two "special circumstances"

findings: "multiple murders" and "felony murder." The trial court made a specific finding that the felony-murder special circumstance was untrue: "As to the special circumstances allegation the Court finds that the special circumstance allegation as to Count III relating to the fact that the murder was committed during the commission of a lewd and lascivious act upon the person of Carl Carter, Jr., in violation of Section 288 of the Penal Code, the Court finds that allegation **is not true**." (RT I 882; emphasis added). Based on the trial court's finding that evidence of the underlying felony was insufficient, trying petitioner a second time under a felony-murder theory violated petitioner's constitutional rights to due process, protection against twice being placed in jeopardy for the same charges or conduct, heightened capital case scrutiny and freedom from cruel and unusual punishment.

Double Jeopardy principles barred retrial on Count III on both first degree theories. As a result, Mr. Reno's constitutional rights were violated by trying him under both theories of first degree murder, when he was acquitted on one of those theories by the trial court. Retrying petitioner on a premeditated theory of first degree murder constituted a separate violation of Double Jeopardy principles because there was insufficient evidence of premeditated and deliberated murder.

Moreover, at petitioner's second trial, he was denied a jury representative of the community. The jury venire in this case grossly under represented Latin Americans and African Americans. The Los Angeles County Jury Commissioner admitted that there was a serious problem because many Latin Americans and African-Americans are rejected from petitioner's "community" to serve as jurors. Wholly unrebutted evidence showed that the

problem could have been corrected at nominal cost. However, nothing was done to allow petitioner's jury to be chosen from a representative cross-section of the community.

Additionally, despite the trial court's finding that there was no felony to support a felony-murder special circumstance, trial counsel did little to challenge the felony-murder claim at the second trial. Counsel should have challenged the coroner's testimony, and introduced mental health evidence showing that the Carter killing was not premeditated. Petitioner has a long history of mental illness including a 3 year stay at Atascadero State Mental Hospital, which would have negated premeditation and deliberation. Trial counsel failed to present this readily available evidence, which was relevant at both the guilt and penalty phases.

Worse yet, trial counsel failed to prepare for the penalty phase though substantial evidence in mitigation was available and should have been presented. This substantial evidence included the fact that petitioner was prematurely released from Atascadero State Hospital where he had been receiving valuable treatment; the fact that Atascadero State Hospital would not readmit him though he felt he needed further treatment; evidence of a very harsh childhood; evidence of his sexual abuse as a child at the hands of trusted authority figures in his life; evidence of life-long mental illness and evidence of mental illness at the time of the offenses. Inexplicably none of this evidence was presented to the jury. Instead, trial counsel called one penalty phase witness who provided a small and inadequate glimpse of Mr. Reno's troubled family history.

As a result of all of these errors, Mr. Reno's state and federal constitutional rights

were violated. Accordingly, this Court should grant the petition for writ of habeas corpus.

II. UNLAWFUL RESTRAINT.

1. Petitioner is unlawfully confined and restrained of his liberty under a sentence of death at San Quentin State Prison, San Quentin, California, by Jeanne Woodford, Director of the California Department of Corrections, and by Thomas P. Goughnour, Warden of the San Quentin State Prison.

2. Petitioner's imprisonment and death sentence are the result of a fundamentally unfair trial. As set forth in petitioner's direct appeals and prior habeas corpus action, numerous constitutional errors plagued petitioner's trial rendering his conviction and sentence unreliable. Additional constitutional violations occurred at the appeals and habeas stages, preventing petitioner from receiving relief from his unjust conviction and sentence.

3. This petition has been filed as soon as practicable after all of the facts alleged as grounds herein became known to undersigned counsel, and counsel could reasonably have discovered the facts.

4. Any delay is attributable to the ineffectiveness of prior appellate and habeas counsel appointed by this Court to represent Mr. Reno. To the extent that claims should have been raised on direct appeal or in the initial habeas petition, petitioner was denied the effective assistance of appellate counsel and habeas appointed by this Court.

III. PROCEDURAL HISTORY.

1. Mr. Reno is confined under sentence of death pursuant to the judgment of the

Superior Court of California in and for the County of Los Angeles, Superior Court Criminal Case No. A445665, which was rendered on July 17, 1987. Clerk's Transcript of second trial, hereinafter referred to as "CT II", at 577.

2. Petitioner was initially charged in an information filed on November 17, 1978, which alleged three counts of murder: Counts I and II, the murders of Scott Fowler and Ralph Chavez respectively, both murders alleged to have occurred on July 26, 1976; and Count III, the murder of Carl Carter, Jr., alleged to have occurred on October 22, 1978. As to Count III, two special circumstance allegations under the 1977 death penalty law were alleged as follows: (1) that the murder was willful, deliberate, and premeditated, and was committed during the commission and attempted commission of a lewd and lascivious act upon a minor in violation of Penal Code § 288 and (2) that petitioner committed the murders of Fowler and Chavez. Clerk's Transcript of first trial, hereinafter referred to as "CT I," 148-150.

3. At the first trial, petitioner waived jury and was tried by a Los Angeles County Superior Court Judge.

4. As to Count I, petitioner was found *guilty of second degree murder*; as to Count II, petitioner was found guilty of first degree murder; and as to Count III, petitioner was found guilty of first degree murder. Relative to Count III, the court found that the lewd and lascivious act special circumstance allegation was *not true*, and found the allegation that petitioner had committed two additional murders as alleged in Counts I and II true. (CT I 248). Petitioner was sentenced to death. (CT I 262).

5. Petitioner's automatic appeal to this Court resulted in reversal of all convictions. *People v. Memro* (I), 38 Cal.3d 658 (1985). This Court issued its remittitur on August 23, 1985.

6. Petitioner appeared in Los Angeles County Superior Court on September 31, 1985. Eight months after the return of the remittitur, the prosecution filed an amended information on May 13, 1986. This information alleged that petitioner had murdered the three victims, in violation of Penal Code § 187. Count III contained a special circumstance alleging that petitioner was charged with multiple murders within the meaning of Penal Code § 190.2 subdivision (a)(3). (Clerk's Transcript from the second trial, hereinafter "CT," 99-101)

7. Petitioner waived time for trial upon return of the remittitur in superior court on September 13, 1985. Seven months later, on April 18, 1986, petitioner withdrew his time waiver. On June 18, 1986, petitioner filed a handwritten motion to dismiss the case for failure to bring him to trial within the 60-day time period. (CT 193-194). The court did not rule on this motion and granted the defense attorneys a continuance over Mr. Reno's objection. The attorneys requested and were granted further continuances from time to time over petitioner's objection, until the matter came to trial almost one year later, on April 1, 1987. (CT 382).

8. On May 19, 1987, the jury returned the following verdicts: guilty of murder in the second degree as to Count I; guilty of murder in the first degree as to Count II; and guilty of murder in the first degree with the special circumstance allegation of multiple

murders as to Count III. (CT 445).

9. On June 11, 1987, the jurors returned a death verdict. (CT 565). On July 17, 1987, after denying motions to strike the special circumstance allegation, to reduce the penalty of death and for a new trial, the trial court sentenced petitioner to death. (CT 577).

10. On Automatic Appeal, the judgment was affirmed by this Court in its entirety. *People v. Memro* (II) 11 Cal.4th 786 (1995), *as modified* 21 Cal.4th 783 (1996).

11. On January 20, 1995, petitioner filed a Petition for Writ of Habeas Corpus in this Court. On June 28, 1995, the petition was denied on the merits.

12. On May 14, 1996, petitioner filed a timely Petition for Writ of Certiorari to the Supreme Court. On October 7, 1996, the petition was denied by the Supreme Court.

13. On April 18, 1996, petitioner filed a request for the appointment of counsel and a stay of all proceedings with the United States District Court for the Central District of California. On June 14, 1996, the Honorable Robert Timlin appointed Stanley I. Greenberg as counsel of record. On January 30, 1997, the District Court appointed Nicholas C. Arguimbau as second counsel.

14. On August 13, 1997, Mr. Greenberg filed a motion for leave to withdraw as counsel of record. On August 29, 1997, the District Court granted the motion for leave to withdraw as counsel.

15. On December 4, 1997, the District Court appointed Michael Abzug as counsel for petitioner as co-counsel with Mr. Arguimbau.

16. On September 8, 1998, petitioner filed a Petition for Writ of Habeas Corpus

in this District Court.

17. On August 3, 2001, Mr. Abzug filed a motion to withdraw as counsel for petitioner. On August 16, 2001, the District Court granted Mr. Abzug's motion to withdraw and substituted Peter Giannini in his place.

18. On November 13, 2001, Mr. Arguimbau filed a motion to withdraw as second counsel. On November 19, 2001, the District Court granted Mr. Arguimbau's motion to withdraw as second counsel.

19. On December 18, 2001, the District Court appointed James S. Thomson and Saor E. Stetler to represent petitioner in federal court as co-counsel with Mr. Giannini.

20. On September 23, 2002, counsel filed a motion for appointment of counsel with this Court. On October 4, 2002, Thomas J. Nolan filed a motion to withdraw as attorney of record with this Court.

21. On October 16, 2002, this Court granted Mr. Nolan's motion to withdraw as counsel and appointed Peter Giannini, James S. Thomson and Saor E. Stetler "for purposes of all postconviction proceedings in this court, and for subsequent proceedings, including the preparation and filing of a petition for clemency with the Governor of California, as appropriate." October 16, 2002 Order.

IV. JURISDICTION.

1. This petition is properly presented to this Court pursuant to its original habeas corpus jurisdiction under article VI, section 10 of the California Constitution.

2. Petitioner's imprisonment is illegal and in contravention of the rights

guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and their individual clauses and sections, by Article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution, and by the Treaties, Covenants and Agreements of International law.

3. Each of the constitutional violations asserted in this petition infected the regularity of the trial, appeal and habeas corpus proceedings, violated fundamental fairness and resulted in a miscarriage of justice.

4. Petitioner has no other adequate remedy at law to raise these claims.

V. TIMELINESS OF PETITION.

1. This petition for writ of habeas corpus is timely filed. On December 18, 2001, present counsel were appointed to represent petitioner in his federal habeas corpus action before the United States District Court for the Central District of California. Counsel filed a request to be appointed to represent Mr. Reno before this Court on September 23, 2002. This Court granted the motion on October 16, 2002.

2. Present counsel learned of the bases for relief alleged in this petition during this time period and the claims have been presented as quickly as possible after the legal and factual bases for them became known. Petitioner was unable to raise issues contained in this petition at an earlier date because former counsel, appointed by this Court, failed to raise these issues on direct appeal or in the previous state habeas corpus action.

3. At all times since his arrest, petitioner was represented by state-appointed lawyers and relied on them to raise all legal issues on direct appeal and to investigate

outside-the-record factual issues and present them in his habeas petition. Petitioner is incarcerated, unschooled in the law and indigent, and was therefore unable to do otherwise.

4. This petition is timely filed pursuant to this Court's Policies Regarding Cases Arising from Judgments of Death (Policies). Standard 1-1.2 provides that a petition is filed without substantial delay if filed within a reasonable time after petitioner or counsel knew or should have known of the factual and legal bases for the claims raised. If there has been substantial delay as to any claim, the petitioner may establish good cause by "showing particular circumstances sufficient to justify such delay." As stated above, counsel only learned of these new claims as he was in the process of preparing Mr. Reno's federal petition for a writ of habeas corpus. The only reason these claims were not raised on appeal or in the first habeas petition is because of the ineffectiveness of prior counsel appointed by this Court.

5. Even if this Court finds there has been unjustified delay in filing this second petition, this case fits within several exceptions to the general rule against delayed or successive petitions as set forth in *In re Clark*, 5 Cal 4th 750 (1993). First, petitioner's claims demonstrate that a fundamental miscarriage of justice occurred. These errors of constitutional magnitude led to a trial so fundamentally unfair that no reasonable juror would have convicted or sentenced petitioner to death in the absence of these errors.

6. Second, because of these errors, Mr. Reno was sentenced to death by a jury that had such a "grossly misleading profile" of him that, absent the errors and omissions raised here, "no reasonable judge or jury would have imposed a sentence of death." *Clark,*

5 Cal.4th at 798. Here, it can be said: "the picture of the defendant painted by the evidence at trial . . . differ[s] so greatly from his actual characteristics that . . . no reasonable judge or jury would have imposed the death penalty had it been aware of defendant's true personality or characteristics." *Id.* at n. 34. Thus, the claims presented should "be considered on their merits even though presented for the first time in a successive petition." *Id.*

7. Respondent will suffer no prejudice by petitioner proceeding with the claims in this petition at this time. It is not the "eleventh-hour petition" that this Court condemned in *Clark*. *Id.* Nor is it a petition filed to cause "[d]eliberate delay for the purpose of obtaining a last-minute stay . . . ." *Id.* It is a petition that raises substantial claims of constitutional magnitude–issues that Mr. Reno deserves to have considered by this Court. But for the ineffectiveness of former appellate and habeas counsel, these claims would already have been raised and decided by this Court.

8. Good cause and particular circumstances justify the filing of the petition at this time.

9. In light of the particular circumstances of this case, this Court should consider the claims raised in this petition on the merits as the Court has done on previous occasions in other cases. Applying a procedural bar under these circumstances would violate petitioner's rights under the United States Constitution and corresponding provisions of the California Constitution.

10. The claims asserted in this petition involve constitutional questions of extraordinary importance.

11. The nature and irrevocability of a death sentence merits consideration of these claims at this time.

VI. INCORPORATION.

1. Petitioner makes the following general allegations in reference to each claim and allegation in the petition.

2. To the extent that the error or deficiency alleged was due to trial counsels' failure to investigate and/or litigate in a reasonably effective manner on petitioner's behalf, petitioner was deprived of his federal and state constitutional rights to the effective assistance of counsel. To the extent that meritorious claims were not raised in petitioner's appeal and initial habeas petition, petitioner was deprived of his federal and state constitutional rights to effective assistance of appellate and habeas counsel.

3. After petitioner has been afforded discovery and the disclosure of material evidence by the prosecution, the use of this Court's subpoena power, and the funds and an opportunity to investigate fully, counsel requests an opportunity to supplement or amend this petition. Anticipating that respondent will dispute every fact alleged below, petitioner requests an evidentiary hearing so that the factual disputes may be resolved. He is presently aware of the facts set out below, establishing a prima facie case for relief.

4. Petitioner incorporates and bases his claims on each and every Exhibit to this petition, including all factual and legal theories set forth in the Exhibits, in each claim presented as if fully set forth therein.

5. Petitioner hereby incorporates by reference and bases his claims on each and

every paragraph of this petition in each and every claim presented as if fully set forth therein.

6. Petitioner incorporates by reference, as if fully set forth herein, the certified record on appeal and all other documents filed in this Court in the case of *People v. Harold Memro*, Criminal Case No. A445665 (Los Angeles County).[3]

7. Petitioner also incorporates by reference the Opening Brief ("AOB"), Reply Brief ("RB"), Petition for Rehearing ("PR"), and all records, documents, exhibits, and pleading files in *People v. Harold Memro (I)*, California Supreme Court No. 21323 and *People v. Harold Memro (II)*, California Supreme Court No. S004770, as well as the Petition for Writ of Certiorari and original Petition for Writ of Habeas Corpus ("OHP"), the Informal Reply ("IR") and their appendices in In re Memro, California Supreme Court No. S044437, as if fully set forth herein. The claims in this petition incorporate these materials.

8. Petitioner has included all known claims of constitutional error related to his trial, convictions, sentence and imprisonment for the sake of clear presentation and so this Court can assess the cumulative effect and determine that a miscarriage of justice occurred. This includes claims that have been previously presented.

9. Petitioner requests that the Court take judicial notice of all of the above mentioned material record in this case as set forth in paragraphs 6 and 7.

---

[3] The transcript citations in this petition are to the record that was before this Court on petitioner's direct appeal. The transcript abbreviations used in this petition are identical to those used on appeal.

10. Petitioner's confinement is unlawful, unconstitutional and void, in that his conviction and death sentence were unlawfully and unconstitutionally imposed in violation of his rights to: notice, due process, liberty, fair trial, present a defense, unbiased jury, jury trial, effective assistance of counsel, heightened capital case due process, reliable and reviewable guilt determination, individualized, reliable and reviewable penalty determination, fairness in capital case sentencing, the prohibition against cruel and unusual punishments, and the prohibition against death biased proceedings, all constituting arbitrary and unreasonable decision making. Abrogation of these rights is in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, Article I, §§1, 7, 13, 15, 16 and 17 of the California Constitution, and statutory and decisional law of the State of California and the Supreme Court. *See e.g., Hicks v. Oklahoma,* 447 U.S. 343, 346-347 (1980); *Drope v. Missouri*, 420 U.S. 162, 172, 181 (1975); *Pate v. Robinson*, 383 U.S. 375, 387 (1966); *Odle v. Woodford,* 238 F.3d 1084 (9th Cir. 2001); *People v. Laudermilk*, 67 Cal.2d 272, 282 (1967); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Duncan v. Louisiana,* 391 U.S. 145, 147-158 (1968); *Strickland v. Washington,* 466 U.S. 688, 694 (1984); *Coy v. Iowa*, 487 U.S. 1012, 1015-1020 (1988); *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976).

11. Had these violations not occurred, petitioner would not have been convicted or sentenced to death.

12. The following facts support these claims and additional supporting facts will be presented after petitioner is accorded an opportunity for full investigation and discovery,

including access to subpoena power, adequate funding for investigation and experts, and an evidentiary hearing on the merits of these claims.

13. Petitioner adopts and incorporates by reference all facts and claims set forth elsewhere in this petition.

VII. INVESTIGATION.

1. Petitioner needs and is entitled to adequate funding, discovery, an evidentiary hearing and any other opportunity to fully and fairly develop the claims raised herein.

2. Further investigation must be conducted in connection with the present petition for writ of habeas corpus. After that investigation is completed, petitioner may have further claims to present, as well as further evidence in support of the claims set forth herein. At that time, petitioner will supplement the petition as necessary.

VIII. CLAIMS FOR RELIEF.

A. CLAIMS RELATING TO PETITIONER'S ARREST, SEARCH AND CONFESSION.

CLAIM 1: Petitioner's Arrest Was Unlawful.

1. On October 22, 1978, at approximately 8:00 p.m., Carl Carter, Jr. was reported missing from his South Gate home. (RT I 41-42).

2. Within the next few days, South Gate Police Officers Williams Sims and Louis Gluhak contacted Joan Julian, a self-described "psychic." Julian told the officers that she "envisioned" an individual in the company of the victim. Based on her "vision," Julian assisted a police artist in the preparation of a sketch of the individual. (RT I 83-84).

3. Thereafter, on October 27, 1978, Officers Sims and Gluhak visited the victim's parents at their house. They showed the sketch to Mr. and Mrs. Carter who told the officers that the individual resembled petitioner, whom Carl Carter, Sr. referred to as "Butch." Carl Carter, Sr. had worked on petitioner's car and told the officers that several hours **after** the victim's disappearance, petitioner had dropped off his Volkswagen for repairs. (RT I 55-56, 84).

4. The South Gate police officers claimed to be checking all possible leads in looking for the missing child and, therefore, based upon the identification of the psychic's sketch and the fact that petitioner had taken his car to Mr. Carter for repair on the day of the victim's disappearance, Officers Sims and Gluhak decided to go to petitioner's apartment. (RT I 84, 313).

5. According to the officers' testimony, at approximately 3:00 p.m. on October 27, 1978, the officers knocked on petitioner's door. When petitioner responded, the officers identified themselves as police detectives investigating the disappearance of the victim. (RT I 45, 50). According to Sims, petitioner invited the officers into his apartment. (RT I 50).

6. As the state conceded, law enforcement engaged in a warrantless arrest of petitioner, a warrantless search of his house, connected and unconnected areas and a warrantless search of his car. Reporter's Transcript of First Trial, hereinafter RT I, 34.

7. *According to the officers*, once they entered the apartment, petitioner spontaneously remarked that he had been expecting them and that he "had been in

Atascadero Prison before." (RT I 52). After complying with the officers' request for identification, petitioner was said to have uttered "you are going to find out anyway. When I was arrested in Huntington Park in `72 it was because I went into a fit of rage and beat the shit out of a nine year old boy." Petitioner also explained that he had been sentenced to Atascadero State Hospital because of the assault. (RT I 53).

8. Officer Sims asked petitioner whether he had noticed anything "unusual" on the night he left his vehicle at the Carter residence. Petitioner replied that he had not. (RT I 59, 60). While the officers were there, petitioner mentioned to them that he was about to leave his apartment to purchase a car part. The officers visited petitioner for a total of 15 minutes and left when petitioner did. (RT I 53).

9. Directly after leaving petitioner's apartment, Officers Sims and Gluhak visited the Carter residence again. Approximately 25 minutes later, the officers saw petitioner standing between the garage and rear portion of the Carter residence. (RT I 54, 297). Officer Sims approached petitioner and asked him to describe his observations on the night the victim disappeared. Petitioner recalled that at 6:00 p.m. he had gone to the Sizzler Restaurant located in the neighborhood of the Carter residence. After encountering a long line, he instead decided to visit Carl Carter, Sr. to discuss the repair of his car. Upon approaching the rear door of the Carter residence, petitioner was met by Carl Carter, Jr. Petitioner asked the boy if he wanted to go and have a coke. Petitioner and Carl Carter, Jr. went to the Winchell's, approximately two blocks away, for a coke and petitioner told Sims he "didn't do anything" to Carl Carter, Jr. (RT I 60). The last time he had seen Carl, Carter

Jr., he was walking toward his home. (RT I 60, 61, 70).

10. According to the officers' testimony, immediately following petitioner's statement, Officer Sims advised petitioner that he was under arrest for "investigation of 207, kidnapping." Petitioner was handcuffed, placed in a police car and transported to the South Gate Police Station. (RT I 62).

11. On direct examination, Officer Sims claimed the following factors supported petitioner's arrest: the seriousness of the crime; the fact that a seven-year-old boy had been missing for a week; the fact that petitioner had not mentioned his meeting with the boy during his prior conversation with the officers at his apartment; the fact that petitioner stated he had not done anything to the boy; the fact that the boy was first observed by his parents to be missing at 6:00 p.m., the same time petitioner had appeared at the Carter residence;[4] and the belief that petitioner was the last person to have seen the boy before his disappearance. (RT I 62-63). Officer Sims felt that these factors led him "to believe that he was possibly involved in the missing boy's disappearance." (RT I 62).

12. Officer Sims stated that at the time he approached petitioner at the rear of the Carter residence, petitioner was not a suspect. (RT I 65, 66). The probable cause to arrest petitioner was generated by the conversation between Sims and petitioner at the rear of the Carter residence. (RT I 66). Officer Sims recalled that the conversation terminated with petitioner's statement, "I didn't do anything to him. The last time I saw him he was walking

---

[4] This information was contradicted by an official police report in Sims' possession, which related that Carter was not missing until 7 p.m.

towards home." (RT I 66, 70).

13. Petitioner testified that on the day of his arrest, October 27, 1978, after arriving home from work around 2:30 p.m., he decided he would pick up a car part at a junk yard and take it to Carl Carter, Sr. (RT I 98, 132, 134). At approximately 3:10 p.m., as he was getting into his car in front of his residence, Officers Sims and Gluhak pulled up across the street, identified themselves as police officers and requested to speak with him. The officers and petitioner conversed while standing in front of an unmarked car. (RT I 97, 98).

14. Officer Sims informed petitioner that the officers were investigating the disappearance of Carl Carter, Jr. petitioner told the officers that he knew the Carter family because Carl, Sr. did repairs on his vehicle. (RT I 98). In response to questioning, petitioner told him that he had left his vehicle at the Carter residence the previous Sunday around 11:00 p.m. (RT I 99).

15. Officer Sims asked whether petitioner had previously been arrested. Petitioner answered that he served time in Atascadero on a charge of Penal Code § 273(d), for which he was currently on probation. (RT I 99). Petitioner commented to the officers that he had expected their visit due to his prior commitment in Atascadero, his acquaintance with the Carter family and his belief they would check out all leads. (RT I 105).

16. Officer Sims then asked to search petitioner's apartment. Petitioner asked "Would it do me any good to say no?" to which Sims answered negatively. (RT I 100). Petitioner followed the officers to his apartment, and opened the door believing that the officers would force entry into the apartment if necessary. (RT I 100, 138). Petitioner did

not object to a search of his apartment, believing he had no option to refuse. (RT I 100, 101).

17. Officers Sims and Gluhak entered the living room, searched the apartment and took nothing. Upon leaving the apartment, Officer Sims asked petitioner whether he could search the trunk of petitioner's car. Petitioner again asked "Would it do me any good if I said no?" to which Sims responded negatively. The officers searched the trunk and then left without seizing anything. (RT I 105, 106).

18. After retrieving the car part from the junk yard, petitioner went to the Carter's house, approaching the rear door. He observed Officer Sims conversing with Mr. and Mrs. Carter. (RT I 106). Petitioner handed Mr. Carter the vehicle part and began to leave. Officer Sims followed him and said he had further questions. (RT I 107).

19. Officer Sims again asked petitioner about the last time he had seen the Carter boy. Petitioner explained that he had come to discuss his vehicle's repair with Carl Carter, Sr. and saw Carl Carter, Jr. playing with the neighborhood children. (RT I 107). Petitioner said that he delivered his car to the Carter residence at 11:00 p.m. on Sunday, the day of the boy's disappearance. Officer Sims asked whether petitioner had observed anything unusual. Petitioner told him that he recalled seeing police vehicles and several neighbors and family members outside the residence. Sims told petitioner that Officer Gluhak had further questions for him and summoned Gluhak on his walkie-talkie. (RT I 108, 109).

20. After Officer Gluhak joined Officer Sims and petitioner, a discussion ensued about petitioner submitting to a lie detector test. (RT I 110, 113). The officers then

showed petitioner a copy of the psychic's "visionary" sketch and petitioner remarked that he did not recognize the individual depicted. (RT I 112, 113). Officer Sims opined that the sketch resembled petitioner and said that he had sufficient evidence to arrest petitioner for kidnapping, but to avoid arrest, Sims asked petitioner to consent to taking a polygraph at the police station that night. (RT I 113, 114). Although petitioner had a dinner date for that evening (about which he had previously told the officers), he agreed to the polygraph test. (RT I 113, 114).

21. Officer Sims testified that petitioner was arrested for "investigation" of kidnaping of Carl Carter, Jr. At the time of the arrest, Officer Sims knew (1) the victim had been missing from home for five days; (2) petitioner had informed the police officers of his stay at Atascadero State Hospital six years prior for assaulting a young boy; (3) the Carters identified petitioner as resembling the psychic's visionary sketch; (4) petitioner, who knew the Carter family, initially told the police that he had not observed "anything unusual" on the day of the boy's disappearance and subsequently stated that he took Carl Carter, Jr. to Winchell's and then returned him home. (RT I 62-63, 351-352).

22. Here, the arresting officers did not entertain a subjective belief that petitioner was guilty of an offense and, even if they had, it did not meet the legal probable cause standard. Officers Sims and Gluhak did not possess a subjective belief that petitioner was guilty of a crime. This is demonstrated by their own characterization of the arrest as being for "investigative purposes." For example, in referring to the factors upon which the arrest was based, Officer Sims testified that he believed that petitioner was "*possibly*

involved" in the disappearance of Carl Carter, Jr. (RT I 162). Indeed, Officer Sims stated that petitioner was arrested only for *"investigation* of 207, kidnapping." (RT 61).

23. Because the officers themselves did not have a belief in the guilt of the petitioner at the time of arrest for purposes of custodial interrogation, the fruits of that arrest must be suppressed. The circumstances known to the officers failed to establish probable cause to arrest. Petitioner made no attempt to flee but rather accommodated the police questioning and then went on with his own business even if that meant encountering the officers again. His only arguably suspicious conduct the police could point to was the alleged inconsistency regarding the last time he had seen Carl Carter, Jr.

24. Assuming, *arguendo*, that the arresting officers did entertain a subjective belief in petitioner's guilt, the reasonableness of such belief, measured objectively, fails to meet the probable cause standard. At the time of the arrest, there was no evidence that a crime had been committed. No witness had observed the boy's abduction, no ransom note or other indicia of extortion had been received, no possessions belonging to the boy had been suspiciously abandoned near his home and no evidence of foul play had been detected. What was known was that a child had been missing from home for five days. While such disappearance is a serious cause for concern, it could be caused by non-criminal factors including the loss of way; an incapacitating injury due to an accident; or the child's act of running away from home.

25. Even if reason to believe that a crime had been committed existed, there was no reason to believe that petitioner was culpable. At the time of the arrest, the officers

knew that petitioner knew the missing boy and his family. That six years prior, he had received psychiatric treatment for assaulting a boy cannot be viewed as indicative that he committed some unknown crime, nor has a present propensity to commit a crime. If so, police could randomly arrest people and "round up the usual suspects." Such an unfounded theory of arrest is not tolerated by the Fourth Amendment.

26. Moreover, the fact that petitioner was depicted in a sketch prepared from a psychic's "vision" lends no evidence of his culpability. The psychic's sketch and her "vision" of petitioner in the company of the boy are devoid of those indicia of trustworthiness necessary to lead a "man of ordinary care and prudence" to draw any conclusion, much less one justifying an arrest. Indeed, the trial court found that factor unreliable for inclusion in the probable cause determination. (RT I 351).

27. Officer Sims testified that the factors of acquaintance, past psychiatric treatment for a juvenile assault and identification based on a psychic's vision were insufficient for probable cause. In Officer Sims' words, prior to the conversation with petitioner at the rear of the Carter residence, petitioner "was not a suspect." (RT I 65-66). By the arresting officer's own explanation, the conversation at the Carter residence itself transformed the officer's belief that petitioner was not a suspect into a "strong and honest suspicion" that petitioner was guilty of kidnaping.

28. During that conversation, two facts were revealed. First, petitioner indicated proximity to the missing boy an hour before he was last reported to have been seen. Second, this recollection was allegedly inconsistent with petitioner's prior comment at his

apartment.

29. An accused's proximity to an alleged victim of a crime an hour before the crime's occurrence, while justifying further inquiry, cannot support an arrest. Moreover, petitioner stated that he last saw the boy walking home unharmed. (RT I 70). Furthermore, the police officers knew of evidence which not only corroborated petitioner, but indicated that the boy's brother, not petitioner, was the last person to have seen Carter.[5]

30. Even the alleged inconsistency between petitioner's statement at his first police interrogation and the second comment did not constitute either a suspicious circumstance or probable cause to arrest. During the interrogation at petitioner's apartment, Officer Sims said that he asked whether petitioner had observed "anything *unusual*" on the night of the boy's disappearance, to which petitioner responded negatively. (RT 59-60, emphasis added). Officer Sims further testified that during the subsequent conversation at the Carter residence, petitioner recalled contact with the boy around the time of his disappearance. (RT 60). To Officer Sims, petitioner's conflicting statements evidenced a consciousness of guilt.

31. Upon closer scrutiny, no inconsistency exists. Officer Sims never inquired if petitioner had actually seen the boy on the day of his disappearance. Moreover, simply seeing Carter at the boy's own house is hardly "unusual." Thus, petitioner's statement that he had not seen "anything unusual" could not reasonably be interpreted to mean that he had not

---

[5] This information was contained in the missing-juvenile report in the possession of the police. (RT 282).

seen the boy. Under these circumstances, petitioner's failure to go into any detail upon his first conversation with the officers is not inconsistent with his subsequent statement at the Carter residence. Indeed, any "inconsistency" is attributable to the framing of Sims' question. Petitioner understood the inquiry regarding anything "unusual" to refer only to the presence of suspicious circumstances or individuals at the time in question. Hence, the final fact justifying the arrest lacks merit.

32. Thus, the arresting officers lacked a subjective belief that petitioner had committed a crime and, even if such belief existed, the reasonableness and sufficiency of that belief failed to comply with the probable cause standard.

33. Petitioner's confessions were "obtained by exploitation of the illegality of his arrest." *Dunaway v. New York*, 442 U.S. 200, 217 (1979). The confession was procured during extensive interrogation after petitioner had been illegally arrested and immediately detained in isolation (i.e., cut off from the outside world) for more than six consecutive hours. Furthermore, there were no intervening circumstances between the illegal arrest and the confession. The only event between the illegal arrest and the confession was prolonged incarceration and interrogation. The purpose and flagrancy of the official misconduct in this case are undebatable. The arresting officers testified that petitioner was being arrested for "investigation" of kidnaping. His treatment from the moment of his arrest demonstrates that the officers were willing to hold him without probable cause until he "confessed."

34. The state made no attempt to demonstrate that petitioner's confession was

obtained other than by exploitation of his arrest. The prosecution, in fact, acknowledged repeatedly that proof of the illegality of the arrest would necessarily justify suppression of the confession. (RT 336, 749). Accordingly, because the arrest was unlawful, the trial court erred in not suppressing the confession.

35. In addition to the confession, petitioner sought suppression of additional evidence seized as a result of his illegal arrest. The prosecution conceded that should the court find the arrest illegal, all of this evidence would be inadmissible. (RT I 336). This evidence includes all physical evidence seized from the residence or garages belonging to the petitioner; all physical evidence seized from the automobiles; all observations made in the residence, garages or automobile after October 27, 1978 and any evidence seized at the recovery location of the deceased body. (CT I 189-190). The officers admitted that they had no idea where the body was before petitioner's arrest and subsequent confession and that they probably never would have found it. (RT I 382).

36. Numerous items found in one of the garages were introduced at trial. These included a red suitcase containing boy's undergarments and a piece of rope resembling the rope found on the body. (RT 2437, 2443). Some photos of nude young boys as well as rolls of masking tape recovered from inside the house were introduced at trial. (RT 2244).

37. Assuming the initial arrest was illegal, the trial court was compelled to suppress these items as direct fruits of the illegal arrest, under state as well as federal precedents. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *People v. Superior Court (Zolnay)*, 15 Cal.3d 729, 734-735 (1975). As in *Zolnay*, these items were located

solely as a result of petitioner's confession and alleged permission to search given during the interrogation within hours of his arrest.

38. Regarding the murder of Carl Carter, Jr., the prosecution presented little, if any, evidence other than that which flowed directly from the arrest and confession. Even the location of the body and the ensuing autopsy report were the fruits of the arrest.

39. As to the other two murders, there is no evidence other than the alleged confession that connects petitioner to the crime. These homicides occurred two years before petitioner's arrest and the only suspects arrested had been released. No physical evidence from the crime scene or petitioner's home connected him to the murders. Indeed, the only eyewitnesses who saw the victims before the murders were **not** able to identify petitioner as the person seen with the victims in the park that day.

40. Moreover, the independent testimony of the witnesses and the police supports the theory that petitioner was **not** seen in the park on the day of the murders. Once again, without the confession, petitioner would not have been convicted.

41. In summary:

a. Petitioner's arrest was illegal both because the police lacked a subjective belief in petitioner's culpability and, viewed objectively, the arrest was made without probable cause.

(1) The police arrested petitioner for "investigation" of crimes rather than out of a belief that there was probable cause to believe he had committed a crime.

(2) There was insufficient evidence that a crime had been committed and the sole bases for the arrest were the non-inculpatory statements of petitioner and a "vision" from a psychic.

b. The confession was tainted by the illegal arrest and was therefore inadmissible.

c. All other evidence obtained as a result of the illegal arrest and confession was inadmissible.

d. The illegality of the arrest requires reversal of the convictions.

CLAIM 2: Petitioner's Alleged Confession to the South Gate Police was Coerced.

1. Following his arrest, petitioner was transported to the South Gate Police Department around 4:00 p.m. He was taken to a booking cell, searched and then led into the interrogation room. (RT 711). According to Officer Sims, petitioner was advised of his *Miranda* rights and he told the officers that he did not wish to speak with an attorney. (RT 687). He then related the same sequence of events to Sims as before, i.e., that he saw the Carter boy when he went with him to Winchell's. (RT 689). This interrogation lasted thirty minutes. Petitioner was returned to a holding cell. (RT 712, 713).

2. Two or three hours later, petitioner was brought back to the same room. The officers testified that he was again advised of his rights. Present at this interrogation were Officers Sims, Gluhak, Carter and Greene. (RT 691). During this second interrogation, petitioner allegedly confessed to the murders. (RT 693). Neither of these interrogations

were tape-recorded.

3. Sims testified that he and the other three detectives had worked together a number of times. (RT 701). Detective Greene was a powerfully built individual whom the trial court described as a "physical specimen" with a "huge chest and big arms." (RT 868). At times during the interrogation, he would get up and block the door. (RT 850). Sims asked Officer Lloyd Carter to conduct the second interrogation because of Carter's ability to extract information and his experience. (RT 846). The interrogation room was small, about 8 feet by 15 feet. Although Sims "could not recall" any dents or impressions in the wall (RT 697, 698-701), Carter testified there was a 6"-8" indention or dent in the interrogation room wall. (RT 853).

4. Officer Carter testified that he was present for the interrogation, during which petitioner appeared "emotionally upset." (RT 837). He spoke about Carl Carter, Jr.'s murder first and thereafter became very upset. (RT 840).

5. Carter and Sims left the interrogation room for a few minutes at that point and Carter told Sims, "Well, we have him talking, let's talk some more. He may be good for a few other murders or criminal involvement." (RT 842). The detectives then re-entered the room and, without re-advising petitioner of his rights, questioned him about the other murders. (RT 851). Carter stated that when he questioned petitioner, he was aware of petitioner's prior commitment to Atascadero State Hospital. Petitioner indicated that he would like to return to Atascadero. (RT 855, 857). Petitioner asked to make a phone call to a counselor at Atascadero during the interview (RT 866); his request was denied.

6. Petitioner testified that he was not told he was under arrest, that he was allegedly being taken to the station for a voluntary polygraph examination, and that upon arrival at the station, he was placed in a holding tank and strip-searched. His request to make a phone call was denied. (RT 2153). He was kept alone for an hour and then brought to the interrogation room where Sims and Gluhak were waiting. After repeating only that he had seen Carl Carter, Jr. last after taking him for a Coke, the officers returned him to a holding cell. (RT 2155, 2156).

7. Forty-five minutes later, petitioner was again taken back to the interrogation room, where Sims and Gluhak told him that the Huntington Park Police Department said he was a "sicko." He was shown a pair of jeans, underwear and a t-shirt that Sims said he thought belonged to Carl Carter, Jr. and which petitioner recognized as having been seized from the bathroom of his apartment. Petitioner told the officers that the clothes did not belong to Carl Carter, Jr. and that he wanted to leave if they were not going to give him a polygraph test, as previously indicated. Sims then told him for the first time that he was under arrest for kidnaping. Petitioner was again returned to a cell and booked and his request to make any phone calls was again denied. (RT 2157, 2159).

8. Petitioner was taken into the interrogation room a third time and Sims, Gluhak, Carter and Greene were all there. Sims introduced Carter as the "boss man" or something to that effect. Greene was wearing Levi's and a tight-fitting tank-top shirt. Carter pointed out that Greene was large and that he had been hired for his muscle. (RT 2160). He also asked petitioner if he thought that he could beat Greene in a fight.

Petitioner said he thought if he got into a fight with Greene, that Greene would probably kill him. Carter responded that Greene would probably kill him if someone didn't stop him. Petitioner estimated that Greene was around 6'1" to 6'2", 220-225 pounds. At that time, petitioner himself was 5'9½" and probably weighed between 155 and 165 pounds. It was obvious that Greene lifted weights and worked out extensively. Greene said that he knew how to fight and get answers to questions. (RT 2161).

9. Petitioner felt Greene was threatening him. Either Carter or Greene pointed out the hole in the wall of the interrogation room to petitioner. They asked him how he thought it got there and whether he would like his head to make a matching hole or enlarge it. It was not an actual hole but a depression or dent. (RT 2162, 2165-2166). Greene commented that the walls in the interrogation room needed to be spackled and painted practically every day. At that point petitioner was crying and scared; he was afraid of Greene. (RT 2167).

10. On a couple of occasions during the interrogation, Greene postured and flexed his muscles. (RT 2168). During the interrogation, petitioner repeated that he had already told them everything he knew about the crime. (RT 2160). Petitioner had not been read his rights and he told the officers that he wanted an attorney. (RT 2161, 2165). He told the officers that he wanted to meet with a friend of his, Linda Brundige, who was a reserve deputy sheriff and who lived right behind the station. (RT 2169). The officers agreed. During a break in the interrogation, Carter told the jailer to let petitioner have two calls. The jailer dialed Linda's number and Linda told petitioner she would come right over.

(RT 2170). However, after petitioner had made the call and asked Linda to come over to the station to see and speak with him, the police then told him that he would not be allowed to see her. (RT 2172).

11. Petitioner testified that the officers said that they had already acted improperly and that the case would probably not hold up in court. They told him they thought he was mentally ill and that he would be returned to Atascadero and that this could be done even without filing charges. (RT 2162). They told him they would help him get re-admitted to Atascadero if he cooperated. They also told him that if he was convicted of kidnaping a young boy, he probably wouldn't live very long in prison. (RT 2163).

12. At this point, petitioner still maintained he did not know anything. Petitioner said he was willing to cooperate any way he could. When Carter mentioned that petitioner might be able to return to Atascadero, petitioner asked if he could call his former sponsor at Atascadero and talk with him. Carter told him that he could call him after he cooperated. It was petitioner's understanding that Carter promised to get him back to Atascadero if he cooperated with the officers. (RT 2168). Following this promise, petitioner offered a confession.

13. The South Gate Police Department police officers, and these officers in particular, were notorious for using harsh and unethical methods to try to coerce confessions from suspects. For example:

a. Louis Moreno testified that he was arrested in 1978 by South Gate Police. One of the officers (apparently Greene) who arrested him was very large.

After breaking into his house, the large officer started kicking him in the head and temples while the other officer kicked him in the ribs. His head was pushed through a door. (RT 1308-1313).

b. Peter M. Williams, petitioner's trial counsel at the first trial, identified photographs of Angelina Nasca. One photograph showed Ms. Nasca with a scar on her cheek, which was the result of Officer Greene hitting her and driving her tooth into her cheek. Greene thereafter threatened to put her head through the wall of the interview room if she did not confess to a burglary. (RT I 591-592).

c. Angelina Nasca's testimony from the prior trial was admitted in evidence by stipulation at this hearing. Ms. Nasca was arrested by Officer Greene on November 1, 1978, just four days after petitioner's interrogation. Upon her arrest, Ms. Nasca was thrown against the side of a car and kicked by Officer Greene. (RT I 591-593). When taken to the South Gate Police Department interrogation room, she noticed a hole in the wall. She was seated in a chair right below the hole. Officer Greene threatened her, telling her that if she did not start talking and telling him the truth, he was going to put her head through the hole. He told her he had done this to another suspect. Nasca testified that she was struck three times, once when arrested and twice in the interrogation room. She was hit once in the back, once in the head and once on the side of the face. (RT I 598-601).

d. Michael Bridges testimony in the first trial was made part of the evidence at this hearing. (RT 2241). Bridges testified that Officer Greene had arrested him and put him in a police car. Every time the car came to a stoplight, Officer Greene would hit him with a billy club. Bridges was handcuffed at the time and Officer Greene struck him in the back, down the side of his arm, down his leg, and on his calves. Before they got to the station, Greene told him that he should kill him, that he was a hostage and that no one knew where he was. Once inside the station interrogation room, Bridges was given a *Miranda* waiver card, which he signed, asking for an attorney. Greene took the card and tore it up. Greene then called him a smartass and started hitting him with a blackjack, asking if he was going to cooperate. Greene had told him that they frequently repainted the interrogation room because the officers repeatedly knocked the paint off the wall. Bridges stated that he saw a plaster spot about the size of someone's head on the wall. (RT I 772-782).[6]

e. The testimony of Bridges and Nasca was unrebutted.

14. Jailhouse informant Anthony Cornejo testified for the prosecution at the hearing. He stated that petitioner spoke with him while on a bus to court on July 17, 1986. (RT 994). According to Cornejo, petitioner stated that he had lied to his attorneys about

---

[6] The citizen complaint records had been purposefully destroyed before the second trial and were not available for review by defense counsel. The trial court refused to impose any sanctions for their destruction; thus, no evidence of such complaints was admitted during this hearing or at trial.

the coercion of his confession and that he freely gave the statements to the police. (RT 995).

15. At the end of the 402 motion, the court ruled that petitioner was fully advised of his constitutional rights, that his statements were voluntary and that there had been no threats or promises of reward or leniency. The court held that the confession was admissible. (RT 2266).

16. The trial court erred in its ruling that petitioner's confession was voluntary. The record in this case provides a startling example of a confession induced by threats and a coercive atmosphere.

17. This Court was required to review the voluntariness of the confession to determine if the prosecution sustained its burden of proving it was voluntary beyond a reasonable doubt. *People v. Jimenez*, 21 Cal.3d 595, 608 (1978). Under the federal constitution, the court applies a lesser burden, as the prosecution must show voluntariness by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 774, 984 (1972). The latter standard was adopted by this Court for crimes occurring after the adoption of Proposition 8. *People v. Markham*, 94 Cal.3d 36, 17 (1989). Because the challenge raised by the defendant involves both the federal and state constitutions, this issue should have been analyzed under both standards.

18. In reviewing the voluntariness of a confession, the ultimate issue is reviewed independently by the reviewing court. *Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973). Under either standard, petitioner's confession should have been suppressed here.

19. An examination of the circumstances surrounding the interrogation of petitioner—including the unrefuted, independently corroborative testimony of witnesses describing systemic misconduct by the South Gate Police Department—reveals a coercive atmosphere.

20. Prior to the interrogations at the South Gate Police Station, petitioner had twice been approached by police officers, once at his home and again at the Carters' residence. Both times police questioned petitioner regarding Carl Carter, Jr. and both times petitioner denied any knowledge of his disappearance. Nevertheless, he was arrested and taken to the police station.

21. From the moment of his arrest, the tone was set for the ensuing interrogation. It was clear that, despite petitioner's protestations of innocence, the officers were not going to leave him alone until they extracted the information they wanted, even according to the police testimony. Once at the jail, petitioner was again interrogated and again reaffirmed his lack of involvement in Carl Carter, Jr.'s disappearance. Unsatisfied with his answers, Officer Sims turned the role of inquisitor over to Detective Carter since Sims himself had been "unsuccessful." (RT I 468).

22. The interrogations took place in a cramped room that measured 8 feet by 15 feet, with a large table.[7] According to the officers' testimony, at the second interrogation,

[7] Although Sims did not recall any dents in the wall, Carter testified that there was an indention six to eight inches in diameter. The existence of the mark in the wall was confirmed by the testimony of petitioner, Nasca and Bridges. When the defense investigator went to photograph the indentation prior to the first trial, the hole been freshly repaired.

there were a total of four officers in the room, one of them Officer Greene, whom Carter described as "powerfully built" and by the court's own observation was "a physical specimen with a huge chest and big arms." (RT I 868). It was at this session that petitioner was said to have first confessed.

23. Despite the officers' denials that force was actually used to extract the confession, the court must accept the facts describing implicit menacing threats made to petitioner because the police did not refute, and in fact corroborated, testimony regarding their mistreatment of other suspects. Petitioner stated that Carter was introduced to him as the "boss man." Carter in turn explained that Greene had been hired for his muscles. Petitioner was also told that Greene would probably kill him in a fight unless restrained and Greene himself said he knew how to get answers to questions.

24. The indentation in the wall was pointed out to petitioner by his interrogators and he was asked if he would like to make a matching impression with his head. Other comments were made about the dent and Greene continued to flex his muscles menacingly.

25. Petitioner's testimony concerning the dent and Officer Greene was substantially corroborated by others who had experience with the South Gate Police and by the photos taken by the defense. Both Bridges and Nasca had been violently attacked by Officer Greene. Nasca and Bridges, as revealed through their prior testimony, had been told that their heads would be put through the wall of the interrogation room if they did not cooperate. This evidence corroborates petitioner's account of the interrogation and

undermines the self-serving testimony of the police officers.[8]

26. The presence of Greene at the interrogation clearly had no purpose but to threaten. Sims and Gluhak were the investigating officers and Carter was there because of his "successful interviewing techniques." There was no reason, however, for Greene to be there except as a coercive threatening force who would induce petitioner to confess.

27. In addition to the threat of physical force, the officers engaged in significant psychological coercion of petitioner. The officers made an offer of psychiatric treatment in response to petitioner's request to be returned to Atascadero. They stated he was mentally ill, promised treatment at Atascadero and also threatened him with harm should he be sent to prison.

28. The trial court's determination was erroneous and not supported by substantial evidence and, thus, must be rejected by this Court. The police testimony failed to refute the significant areas of corroboration that supported petitioner's testimony. The court was presented with several witnesses who had been similarly coerced and abused by the South Gate police officers who interrogated petitioner. In addition, the indentation in the wall was corroborated by these witnesses, the testimony of at least one of the police

---

[8] Petitioner testified to other occurrences during the interrogation which the prosecution's witnesses failed either wholly or adequately to dispute. This evidence included petitioner's assertions that he was denied telephone calls, that when he did make a telephone call he was denied the promised access to his visitor, that he was confronted with a child's clothing taken from his apartment, that officers told him he would be returned to Atascadero without any charges filed, etc. This testimony should be believed when viewing the totality of the circumstances of his interrogation. Petitioner also contends, however, that the evidence of threats made to him through Officer Greene and reference to the hole in the wall are adequate by themselves to establish the involuntary nature of his confession.

officers, and a photograph depicting the wall with a new repair in exactly the location as described in testimony. Finally, the destruction of the *Pitchess v. Superior Court*, 11 Cal.3d 135 (1974), materials casts significant doubt on the testimony of the officers. (For the details of the destruction of this material see Claim 18.) These records would have supported petitioner's position that complaints of force had been made against these officers and would have supported his version of the illegal interrogation tactics used by the police involved.

29. The interrogation here involved the threat of physical harm to petitioner both by the police and by other prisoners. The entire circumstances of the interrogation, including the presence of numerous officers in a tiny room confronting petitioner for a lengthy period of time, were coercive. It must be remembered that petitioner had been twice interviewed out of custody, had initially denied any involvement in the crimes when first brought into the station and had been told that he was being taken to the station for a polygraph test. Finally, following multiple lengthy interrogations, an officer's promise to aid his return to a mental hospital in exchange for his cooperation and after being promised, then denied, an opportunity to see and speak with his friend Linda, petitioner confessed. Only after a substantial period of time and after coercive threats and promises had been made to petitioner did he succumb to the officers wishes. In tears and in an extremely emotional state, he then made a confession.

30. Unlike most other cases of confessions in homicide cases, the South Gate

Police chose not to record or in any way memorialize the statements given by petitioner.[9] Indeed, even after the first confession, the Bell Gardens police re-interviewed petitioner the very next morning and allegedly obtained another unmemorialized confession. Nonetheless, this interview was not recorded in any fashion, nor was petitioner asked to write a statement or sign a statement written out by the police. Because of the actions of the police themselves, the only record of the interrogation is the testimony of the officers and petitioner. When added to the willful destruction of the *Pitchess* materials, this omission seriously undercuts the official version of the interrogation and supports the conclusion that the confession was involuntary.

31. The evidence in the instant case points to the inescapable conclusion that petitioner's confession was not freely and voluntarily given. The coercive, isolated atmosphere in which petitioner was confronted with items taken from his apartment in an illegal search and with the presence of four officers in a small room; coupled with the fact that he was physically threatened by Officer Greene, with repeated references to the dent in the wall, render his confession involuntary. The prosecution failed to carry its burden of proof that the confession was voluntary and, thus, the confession should not have been admitted by the trial court.

---

[9] Petitioner believed that the confession was not being recorded and made his statement in reliance on this fact. See Claim 4 below, for a detailed discussion of this issue which forms a separate basis for suppression of the statement.

CLAIM 3: The Search of Petitioner's Residence was Unlawful.

1. After arresting petitioner and interrogating him at length, the police returned to his apartment without a warrant and seized numerous items of evidence. According to the police, this search occurred at approximately 4:00 a.m. on October 28, 1978, the day after petitioner's arrest. (RT I 449).

2. No attempt was made to secure a search warrant. (RT I 446). The officers claimed they searched pursuant to consent from petitioner obtained after waking him up at 4:00 a.m.

3. Officer Carter testified that after the police returned from recovering Carl Carter, Jr.'s body, he and Officer Sims approached petitioner in his cell. They asked petitioner for permission to search his home for clothes and the clothesline used in the killing. Carter testified that petitioner agreed and asked to accompany the officers. They refused and petitioner allegedly reaffirmed his consent to search. (RT I 444-445).

4. Petitioner denied that this conversation in his cell ever occurred. (RT I 510). He provided uncontradicted testimony of three incidents which demonstrated that the first search of his apartment occurred before his confession.

a. In the second interrogation by Sims and Gluhak and prior to the confession, petitioner was shown a pair of boy's jeans, a t-shirt and some underwear, and was asked if he recognized them. He answered affirmatively, realizing that the clothes had been taken from the bathroom of his apartment. He denied that the clothing belonged to Carter. (RT I 459).

b. During the interrogation by Officer Carter, petitioner had been asked to undress partially once more, despite a previous strip search, because the officers wanted to compare petitioner's body with pictures the police had obtained. (RT I 471-472). Petitioner knew these pictures had been taken from his apartment. (RT I 490).

c. During Officer Carter's interrogation, one of the other officers remarked on the large number of books on witchcraft and the occult in petitioner's apartment. Since petitioner had such books in his apartment, he again recognized that the police had already searched his residence. (RT I 491).

5. If petitioner's uncontradicted testimony is accepted, it is clear that the search was illegal since it was conducted without a warrant, without any exception to the warrant requirement and without probable cause, and prior to when the police claimed to have asked for permission.

6. Even if the prosecution's version is accepted, the search was still unconstitutional.

a. Petitioner was asleep in his cell when he was said to have been approached in the early morning hours (approximately 4:00 a.m.) after being in custody for almost 12 hours. During that time, he had been interrogated repeatedly for over 6 hours and eventually purportedly confessed to the crime. He had shown the officers the location of the body and then been returned to jail. (RT I 399, 417, 511). He had barely eaten, had not been allowed to see

counsel and had asked to be isolated because of fear for his life. (RT I 448). He had also pleaded with the officers not to force him to view Carter's body. (RT I 380).

b. Under these circumstances, there was no consent. Petitioner's custodial status, combined with the clear emotional stress he had been under throughout his incarceration and the time at which he been awakened, indicate that consent was not freely given.

c. Additionally, petitioner sought to accompany the officers to the apartment. This was an attempt to condition the search. Although Officer Carter stated that he refused the request and petitioner thereafter agreed to the search, the voluntariness of any consent in these circumstances is highly suspect. The officers' self-serving testimony that petitioner consented must be rejected.

7. Further, even if there was valid consent, the actual search exceeded the scope of the consent and was therefore illegal.

a. The search exceeded the area of petitioner's apartment to which he allegedly gave consent (e.g., the garages) and exceeded the types of objects for which he allegedly gave consent to search.

b. The police used petitioner's consent to search his "apartment" for two specific items as a pretext for a general exploratory search of his apartment, separately locked storage area and separate garages. There was no permission to seize any items. There was no consent to search petitioner's

garages and locked storage areas, much less consent to seize any items from these separately locked locations.

8. Therefore, the seizure of at least the magazines, photographs and masking tape from the apartment, and everything seized from the garages and other locations, which were introduced into evidence at trial (RT 2452), was illegal and violated petitioner's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights.

CLAIM 4: Petitioner Did Not Knowingly and Intelligently Waive His *Miranda* Rights.

1. Even if the police officers' assertions that petitioner was advised of his *Miranda* rights are accepted, there was nevertheless a manifest lack of understanding of these rights, which resulted in the absence of a knowing and intelligent waiver. Petitioner's preoccupation with the fact that the interrogation room was bugged was a clear indication that he did not wish to give a recorded statement and that he wanted anything that might be said to be "off the record." He believed that an unrecorded, off-the-record statement could not be used against him in court. Carter's false and misleading actions, as demonstrated by his sending other officers out of the room, searching the room with petitioner for recording devices and reassuring petitioner that there were no electronic "bugs" gave legal credence and reinforced petitioner's misunderstanding of any *Miranda* warnings, if in fact given. Carter had a duty to assure that petitioner understood that any statement, recorded or not, could be used against him.

2. Petitioner conditioned his providing a statement on the ground that it be

unrecorded and off the record. As noted in *People v. Braeseke*, 25 Cal.3d 691, 706, n.7 (1979), "even if he assumed that defendant was attempting to condition his discussion with [the interrogating officer], the assumption simply underscores defendant's lack of understanding rather than establishing the invalidity of the request." Carter was required to inform petitioner that such a condition was of no consequence and to make sure that petitioner really understood that his statement would be used whether it was recorded or not. Instead, Carter intentionally misled petitioner, encouraging an obvious misunderstanding of his rights and an unknowing and misinformed alleged waiver.

3. Because petitioner's confession was the sole evidence connecting him to the offenses, introduction of the confession requires reversal of each conviction based upon the Fifth and Fourteenth Amendments.

CLAIM 5: Petitioner's Claim of Coercion and Involuntariness has not Been Fully and Fairly Adjudicated.

1. Petitioner's claim of coercion and involuntariness has never been fully and fairly adjudicated as a result of: (a) improper denial of discovery; (b) deliberate police destruction of evidence; (c) interference with his Sixth Amendment rights through use of police-agent jailhouse informants; (d) informant perjury; (e) the state courts' refusal to take appropriate corrective action in light of clear and convincing evidence of wrongdoing; and (f) this Court's refusal to grant petitioner adequate resources to investigate the issues.

2. Petitioner requested funds from this Court during state habeas proceedings following the direct appeal to investigate these issues but the request was denied.

3. Petitioner's rights to due process; a fair trial; a reliable sentence and freedom from cruel and unusual punishment under the California Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments have been violated.

CLAIM 6: Petitioner's Second Alleged Confession was the Product of the First Involuntary Confession and was also Inadmissible.

1. On the night of his arrest, in the presence of South Gate Police Officers, petitioner allegedly confessed to the commission of all three murders charged. The following day, in the presence of Bell Garden Officers, petitioner again allegedly confessed to the killings charged in Counts I and II of the information.

2. From the time of the first confession episode to the second, petitioner remained in police custody.

3. No evidence or argument was presented below demonstrating that the second confession episode was free of the taint of the prior confession.

4. Therefore, the inadmissibility of the first confession must, under such circumstances, render the second confession inadmissible.

CLAIM 7: Petitioner's Rights were Violated by the Denial of his Right to Bail.

1. Petitioner's conviction sentence of death and confinement were obtained in violation of his constitutional rights to a fundamentally fair and reliable determination of guilt and to penalty, to due process of law and to reasonable bail, as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments and the analogous provisions of the California Constitution by the conduct of the South Gate Police Department in failing to inform

petitioner that he could be released on bail.

2. Petitioner was arrested outside the Carter residence and taken to the South Gate Police Department. Upon arrival, petitioner was booked into the South Gate Police Department, with bail set at $5,000.

3. Petitioner was never informed that he could be released on bail at any time after his arrival at the South Gate Police Department. Petitioner was never informed that bail had been set at $5,000.

4. Petitioner had funds available to post bail and would have posted bail had he been informed that a $5,000 bail was set.

5. The failure to inform petitioner that he could be released upon posting bail of $5,000 deprived petitioner of his only possible means of protecting himself against the coercive pressure placed on him by his interrogators.

6. Had petitioner posted bail, he would not have made coerced, false and unreliable admissions and confessions to members of the South Gate Police Department and the result of the proceedings would have been more favorable to petitioner on questions of both guilt and penalty.

B. CLAIMS RELATING TO THE RETRIAL.

CLAIM 8: Petitioner's Prosecution for First-Degree Murder on Count III Violated the Prohibition Against Double Jeopardy Under the State and Federal Constitutions.

1. Petitioner's conviction, special circumstance findings and sentence of death are illegal and were unconstitutionally obtained in violation of the prohibition against

double jeopardy under the state and federal constitutions as a result of his retrial for first-degree murder on Count III.

2. The violations of these rights, individually and cumulatively, prejudicially affected and distorted the presentation and consideration of evidence as well as every factual and legal determination made by the state courts and the jurors at the guilt and penalty phases.

3. Petitioner was charged in Count III of the complaint with first-degree murder based upon the killing of Carl Carter, Jr.

4. The jury at petitioner's retrial was given four instructions of significance with regard to this killing:

a. That it could find first-degree murder if the killing was deliberate and premeditated (CT 484) (the "premeditation and deliberation" theory).

b. That it could alternatively find first-degree murder if the killing occurred during "commission of or an attempt to commit the crime of lewd act with a child [under Penal Code § 288] and where there was in the mind of the perpetrator the specific intent to commit such crime." (CT 486 (the "felony murder" theory)).

c. That it did not need to have unanimity as to the theory of liability (premeditation and deliberation versus felony murder) but that each juror must be convinced of one theory or the other beyond a reasonable doubt. (CT 502).

d. In response to a specific inquiry from the jury, that as a matter of law, a lewd act on a child could only be found if the attempt or the act commenced while the child was still alive. (RT 2877).

5. Petitioner's request that the jury be polled to determine each juror's basis for concluding that a first-degree murder had been proven was denied by the trial court.

6. The evidence regarding the Carter homicide at the first trial consisted primarily of the testimony of Deputy County Coroner Joseph Choi (RT I 700 *et seq.*), plus, by stipulation, the preliminary hearing transcript. (RT I 734). In particular:

a. Dr. Choi testified at the preliminary hearing that there was nothing remarkable as to the condition of Carter's anus, indicating that there had been no penetration. Although there was some abrasion, Choi could not tell how extensive the abrasion had been prior to the decomposition of the body. (PRT 9-10).

b. Dr. Choi testified at the first trial that he could not tell how extensive the abrasions of the anus had been at the time of death. He also testified, inconsistently, that although no sperm was present, a "2+" testing for acid phosphatase had been performed and that it could "possibly" mean "some seminal fluid may be involved."

c. South Gate Officer Carter took petitioner's alleged confession. He stated that petitioner had allegedly brought Carter to his apartment and had suddenly gotten angry and strangled Carter when the child had said he wanted to go

home; then petitioner allegedly tried to sodomize the dead child but "couldn't get a hard on" and "finally just quit." (PRT 56).

7. At petitioner's first trial, where the prosecution had sought a "lewd act special circumstances" finding for the purpose of death eligibility, the factfinder, a judge, had made the following specific finding of ultimate fact: that the "lewd act" special circumstance was untrue. (RT I 288). The judge necessarily found specifically either that the allegation of premeditation and deliberation was untrue, or specifically that the allegation that a murder occurred during the course of a felony was untrue.

8. Defense counsel argued at both trials that the Carter killing occurred in a fit of rage rather than after premeditation and deliberation and that it did not occur during the commission of a lewd and lascivious act. Petitioner was erroneously not permitted to have either issue taken away from the jury at the second trial, despite the fact that at least one, perhaps both, of these issues had been decided in his favor by the trier of fact at the first trial. (RT 2424).

9. On the first appeal, both parties understood and briefed the case as if the felony-murder theory had been decided in petitioner's favor. In particular, petitioner argued that the judgment had to be reversed because the evidence of premeditation and deliberation was insufficient to support the judgment. Respondent never countered with any assertion that the decision could have been based upon felony murder because both parties understood that the trial court had found the felony-murder evidence to be insufficient. (Petitioner's Opening Brief at 29-33; Respondent's Brief at 135 *et seq.*, Petitioner's

Opening Supplemental Brief at 31-35).

10. On the first appeal, this Court raised *sua sponte* the alternative (felony murder) grounds for finding the evidence sufficient to support the conviction, despite recognizing:

a. that Dr. Choi's testimony was at best "confusing" (*Memro I*, 38 Cal.3d at 693, fn. 37);

b. that an unambiguous finding by the trial court would have created a "bar . . . to analyzing appellant's sufficiency argument on a felony-murder theory;" and

c. that the record "suggested" that "the trial court's special circumstances finding was based on insufficient evidence to establish a violation or attempted violation of section 288." *Memro I*, 38 Cal.3d at 696.

11. Despite all of the above, the trial court, over petitioner's objections on retrial, permitted Count III to go before the jury as a first-degree murder. Moreover, the court instructed the jury on two alternative theories, premeditated murder and felony murder, at least one, perhaps both, of which had necessarily been decided in his favor.

12. The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This protection has been held applicable to state proceedings through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). The California Constitution contains its own provision prohibiting placing criminal defendants twice in jeopardy. California Constitution, Article I, section 15; *see also* Penal Code § 687, 1023.

13. Where two offenses contain the same elements, multiple prosecution for the offenses violates the double jeopardy bar. *Blockburger v. United States*, 284 U.S. 299 (1932). The Supreme Court has explained that:

> The collateral-estoppel effect attributed to the Double Jeopardy Clause, *see Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), may bar a later prosecution for a separate offense where the Government has *lost* an earlier prosecution involving the same facts.

United States v. Dixon, 509 U.S. 688, 705 (1993) (emphasis in original).

14. Where the government has 'lost' in the first prosecution, the court must apply a two-part test to determine if the second prosecution is barred. First, the Court must apply the traditional *Blockburger* test to determine if the two offenses have identical elements or if one is a lesser-included offense of the other. If either is met, the prosecution is barred.

15. Even if the *Blockburger* test is not met, the prosecution is still barred "where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown v. Ohio*, 432 U.S. 161, 166-67 fn. 6 (1977). This test combines the notion of collateral estoppel with that of double jeopardy. *See Ashe v. Swenson,* 397 U.S. 436 (1970).

16. Application of either test mandates reversal of the conviction on Count III on Double Jeopardy grounds. Under the *Blockburger* standard, the felony-murder special circumstance contained both the elements of premeditated and deliberated murder and felony murder. Because of his acquittal of the felony-murder special circumstance and this

Court's failure to decide the issue of sufficiency of evidence of willful and deliberate murder (*see Memro I* at 695), retrial on the premeditated and deliberated theory of first degree murder was prohibited. Despite the acquittal at the first trial, petitioner stood trial on both theories of first-degree murder, at least one of which had previously been found "not true."

17. The first trial court's rejection of the special circumstance allegation was necessarily based on a failure of proof of one of the two theories of first degree murder. Petitioner thus stood acquitted of one of these theories of first degree murder after the first trial. After appeal, to permit retrial violated the Double Jeopardy Clause. It is improper to retry a first degree murder case on both theories of first degree murder if one has been rejected in a prior trial. *See, e.g.*, *People v. Asbury*, 173 Cal.App.3d 362 (1985); *People v. McDonald*, 37 Cal.3d 384 (1984).

18. At the second trial, the prosecutor argued to the jury that they need not agree unanimously on the theory of first-degree murder. (RT 2790). The trial court refused to poll the jury under which theory they convicted petitioner. The jury was not instructed that they needed to unanimously agree on a theory. Thus, there is no way to know whether petitioner was convicted under a theory barred by the Double Jeopardy Clause.

19. Under *Blockburger*'s 'same conduct' test, the conviction must also be reversed. In the first trial, the special circumstance allegation placed at issue the way in which Carl Carter, Jr. was killed and specifically, petitioner's conduct during the alleged murder was placed at issue. The acquittal of the special circumstance allegation barred

retrial on any charges for which the prosecution was relying on the same conduct of petitioner. The concept of collateral estoppel prohibits the retrial on theories of felony murder or premeditated and deliberate murder.

20. Petitioner was tried for a special circumstance that required that he committed the murder with premeditation and in the commission of the specified felony. He was acquitted of that special circumstance. While trial on a lesser charge of second degree murder would have been permissible, it was clear error to allow the jury to be instructed on any theory of first degree murder involving this conduct.

21. Petitioner's case is a hybrid of two situations in which Double Jeopardy applies– acquittal by the trial judge sitting as a fact finder (*see, e.g., Richardson v. United States*, 468 U.S. 317, 325 (1984)) and an implied finding of insufficiency of the evidence on appeal. *See, e.g., Smallis v. Pennsylvania*, 4786 U.S. 140, 142 (1986). The former resulted from the trial court's not true finding of the felony-murder special circumstance. The latter occurred when this Court decided that there was sufficient evidence of felony murder, but found that there was insufficient evidence of premeditated and deliberated murder. *Memro I* at 695. An implied acquittal triggers the protections against Double Jeopardy. *Gomez v. Superior Court*, 50 Cal.2d 640, 652 (1958).

22. The Double Jeopardy Clause does not discriminate between bench and jury trials *United States v. Morrison*, 429 U.S. 1, 3 (1976). The Double Jeopardy Clause applies equally to determinations made on special circumstance allegations. *People v. Superior Court (Engert)*, 31 Cal.3d 797, 803 (1982). Special circumstance allegations

have the "hallmarks of a trial on guilt or innocence." *Bullington v. Missouri*, 451 U.S. 430, 439 (1981).

23. In this situation:

> when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.

People v. Green, 27 Cal.3d 1, 69 (1980).

24. On retrial, Double Jeopardy barred retrial on Count III on either first degree theory; alternatively, it was barred on both theories.

CLAIM 9: Petitioner's Prosecution on Count III Violated Petitioner's Rights Under the Fifth, Sixth, Eighth and Fourteenth Amendments.

1. The trial court, acting as factfinder at the first trial, **made a finding of the ultimate fact that the "lewd act" special circumstance was untrue**. Nonetheless:

a. This Court determined in the first appeal that the finding was "ambiguous."

b. However, neither this Court nor the trial court on remand had the authority to resolve the alleged "ambiguity."

c. This Court permitted the issue of whether the murder had been committed during the commission of a lewd and lascivious act, necessarily decided in petitioner's favor before Judge Stevens at the first trial, to be retried before the jury on the second trial.

2. The trial court record in *Memro I* clearly demonstrates that the parties vigorously litigated the truth of the lewd and lascivious special circumstance allegation in

terms of whether the evidence was sufficient to establish the commission of the substantive underlying felony. The trial court's general verdict convicting petitioner of first degree murder while finding the special circumstance not true led the parties logically to infer that the court had concluded that the murder was premeditated and deliberated but that it did not occur in the course of petitioner's commission of a felonious lewd and lascivious act. On appeal, the focus of the litigation shifted to whether the evidence was sufficient to prove premeditation and deliberation.

3. On appeal, this Court declined to decide the adequacy of the evidence to show premeditation. Instead, this Court found that the trial court might have based its verdict on a theory of felony-murder. *Memro I*, at 696, fn. 44. The case was thus remanded without instructions on the proper scope of permissible charges. The retrial on both theories resulted in an impermissible risk that petitioner's conviction and sentence rested on (1) predicate facts that were rejected by the original fact finder and (2) a theory of first-degree murder of which he was acquitted in the first trial. There is no reliable way to determine which theory the jury relied on nor even to discern that the jury unanimously agreed on a particular theory. This combination of errors requires reversal of Count III because it violated several constitutional rights.

4. This Court's failure to rule definitively in *Memro I* violated petitioner's rights to due process; fair trial; reliable determination of penalty; freedom from cruel and unusual punishment under the Fifth, Sixth , Eighth and Fourteenth Amendments.

5. Defendants are entitled to have their case decided on the basis of the issues

tried and presented at trial. It is improper for an appellate court to uphold a conviction on a charge never brought before the trial court. *See, e.g., Presnell v. Georgia*, 439 U.S. 15 (1978).

6. Here, **the trial judge sitting as the trier of fact found the special circumstance untrue.** Oddly, unless it was an apparent attempt to find a basis to permit re-prosecution, this Court implicitly ruled that the trial court could have found **both** a felony-murder **and** a premeditated murder even though one of these findings was explicitly rejected by the trial court. This amounted to this Court substituting its view of the evidence for that of the fact-finder, in direct violation of *Presnell*. Moreover, it allowed this Court to make factual findings which are properly the province of the trial court fact-finder, not the Court on appeal. *See, e.g., Ring v. Arizona*, 536 U.S. 584 (2002).

7. The trial court's ruling that the felony-murder special circumstance was not true amounted to an acquittal of premeditated murder, felony murder, or both. The only proper solution was to retry solely on a second degree murder charge or another lesser offense. On retrial, any possibility of salvaging a valid first degree murder conviction was lost when the court denied petitioner's request to require a unanimous verdict or polling of the jury on which theory was relied on in reaching the verdict.

8. Because the first-degree murder conviction on Count III was the sole basis for a finding of death eligibility, the retrial on either theory created a substantial risk of arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment.

9. Accordingly, the court on retrial was barred from retrying petitioner on Count III on both theories.

CLAIM 10: Petitioner Was Acquitted of Felony-Murder on Count III and Retrying him Under that Theory Violated Double Jeopardy Principles.

1. As discussed above, petitioner's constitutional rights were violated by trying petitioner pursuant to both theories of first degree murder, when one of those theories was rejected by the trial court. Retrying petitioner on a premeditated theory of first degree murder constituted a separate violation of Double Jeopardy principles, based on this Court's findings in *Memro I* that there was insufficient evidence of premeditated and deliberated murder.

2. In addressing the felony murder special circumstance, the trial court in the first trial referred to the lewd act component rather than the premeditated component in finding the special circumstance not true. (1978 RT 882). The parties had litigated the contention at trial of whether there was sufficient evidence.

3. At the close of evidence in the first trial, the Court stated:

> As to Count III, in which the defendant is charged with the offense of murder on or about the 22nd day of October, 1978, as to the subject Carl Carter, Jr., the Court finds the defendant guilty of the offense of murder and fixes that offense as being murder in the first degree.
>
> Now gentlemen, the code provides that as to the special circumstances allegation the Court find that the special circumstance allegation as to Count III relating to the fact that the murder was committed during the commission or attempted commission of a lewd and lascivious act upon the person of Carl Carter, Jr., in violation of Section 288 of the Penal Code, the Court finds that that allegation is not true.

(1978 RT 882).

4. The plain meaning of the Court's ruling was that it found the allegation that "the murder was committed during the commission or attempted commission of a lewd and lascivious act" not true. Thus, petitioner was not guilty of felony murder.

5. This interpretation of the trial court's ruling is logical and consistent. Nowhere in the trial court's ruling did the trial judge mention the premeditation element of the special circumstance. Instead, the court concentrated solely on the alleged felony, and found it not true.

6. This interpretation of the trial court's ruling is also consistent with the evidence presented during the first trial. As discussed in detail below, a central issue in the first trial was the timing or existence of the alleged Penal Code § 288 violation on Carl Carter, Jr. Counsel at the first trial extensively cross-examined the medical officer about the timing of any such violation. This issue was critical to the felony-murder theory of conviction, as the victim had to be alive at the time of the offense, under California law, in order for that offense to be committed.

7. At the preliminary hearing conducted on November 13, 1978, Dr. Choi testified about Carter's autopsy. The following colloquy took place:

> Q: And the autopsy that you did involving a subject Carl Carter, did you make any particular examination of his anus?
>
> A: Yes.
>
> Q: Did you find anything unusual or extraordinary about his anus?

A: It was decomposed and it was difficult to assess, but there was circular end and a longitudinal operation in the anus.

Q: Were there any unusual or – did you take any tests of any substances found in the anus – were there any other– withdraw the question. Were there any foreign substances found in the anus?

A: Of a remarkable nature? Not visibly. I didn't see anything.

Q: Not visible?

A: No. But it was decomposed and it was difficult to tell.

Q: So there is nothing– there was nothing unusual about the anus consideration, the decomposition; is that a fair statement?

A: Well, there was some degree of abrasion, circular abrasion, and longitudinal operation, but it is difficult to tell how extensive it was before the decomposition.

Q: You could not make any judgments as to the cause or how long– the cause or those abrasions or how long they had been there or anything like that?

A: That's right. It is difficult to tell.

(Preliminary Hearing Transcript at 9-10).

8. Dr. Choi testified during the first trial regarding Carter's death. He discussed the body's decomposition, due to the probability that death occurred approximately 5-7 days before the body's discovery. (RT 702-03). The cause of death was ligature strangulation. (RT 706). He stated that there was "some abrasion of the anus," which may have been caused by decomposition and that he could not tell if there had been any sexual contact. (RT 716-17). He also tested for the presence of any foreign substances. His test was negative for sperm but positive for acid phosphatase, which merely indicates the

possible presence of seminal fluid. (RT 717). He did not know what caused the positive acid phosphatase result. (RT 718).

9. Dr. Choi's testimony was thus ambiguous at best. It was actually more consistent with a finding of no sexual contact as it was with sexual contact. Its speculative nature could have been further emphasized if counsel had engaged in further investigation, as discussed below. If trial counsel had done so, the following facts would have been disclosed:

a. Based upon the state of decomposition of the body at the time of the autopsy, it would have been completely impossible to determine whether any PC § 288 or injury to or penetration of the anus occurred and, if it did, whether it occurred before or after death. In fact, it would have been completely impossible to determine the relative times within 48 hours.

b. The acid phosphatase test described in Dr. Choi's testimony is sensitive to the presence of a component of seminal fluid also found in other body fluids, in bacteria and a variety of food substances. As a result, a positive finding on the acid phosphatase test, even a "4," does not necessarily imply the presence of seminal fluid.

c. A positive finding on the acid phosphatase test in this case was likely a result of laboratory error, since the test was performed at least six or seven days after death, but ordinarily is unreliable after 24 hours of death.

d. The acid phosphatase test is a "Yes or No" test; that is, it determines only that

acid phosphatase is or is not present, it does not determine amounts. The 0-4 scale referred to by Dr. Choi is very subjective, and the meaning of a given value of the number depends upon the subjective view of the individual who ran the test. Because of these limitations, the test is used rarely and had already come into disfavor as of 1987, when petitioner was tried. A positive acid phosphatase test where neither sperm nor seminal fluid is found is not alone indicative of semen.

e. As a result of decomposition, semen ordinarily no longer gives a positive acid phosphatase test after 24 hours. As a result, a positive acid phosphatase test on a swab sample taken from a decomposing body six or more days after death must have come from some other source.

10. Petitioner's alleged statement to police, which the prosecution relied heavily on, also supported a finding that there was insufficient evidence on which to base a felony-murder verdict.

11. The evidence at trial was thus insufficient to support a felony-murder verdict, as recognized by the court. Petitioner's alleged statement demonstrated that any sexual contact did not occur until after Carter was dead, and thus no violation of PC § 288 occurred. Dr. Choi's testimony was equivocal as to whether any sexual contact occurred and he could not determine when any such contact may have occurred. There was simply no evidence to show that Carter's death occurred during the perpetration of a sexual assault. The trial court recognized this fact and dismissed the felony murder special circumstance.

12. This determination by the trial court was a finding of fact. The doctrines of *res judicata* and collateral estoppel, in conjunction with Double Jeopardy principles, prohibited the prosecution from relitigating the case in order to prove a different set of facts. *See, e.g., Ashe v. Swenson*, 397 U.S. 436 (1970).

13. Based on the trial court's finding that evidence of the underlying felony was insufficient, trying petitioner under a felony-murder theory violated petitioner's constitutional rights to Due Process, protection against twice being placed in jeopardy for the same charges or conduct, heightened capital case scrutiny and freedom from cruel and unusual punishment.

14. Since the jury was instructed on felony murder and the trial court denied petitioner's request to poll the jurors as to their theory supporting their verdicts, reversal is mandated. *See, e.g., Suniga v. Bunnell*, 998 F.2d 664, 670 (9th Cir. 1993) ("Where two theories of culpability are submitted to the jury, one correct and the other incorrect, it is impossible to tell which theory of culpability the jury followed in reaching a general verdict") *quoting Sheppard v. Rees*, 909 F.2d 1234, 1237-38 (9th Cir. 1989).

CLAIM 11: Petitioner's Constitutional Rights Were Violated by the Failure to Follow Statutory Requirements Regarding Charges of Felony-Murder.

1. Pursuant to Penal Code § 190.1:

> Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of a crime.

2. Petitioner was not charged with any offense under Penal Code § 288,

although the prosecutor initially brought the special circumstance of felony-murder against petitioner. At the first trial, this special circumstance was found to be not true, although the special circumstance of multiple murder was found true.

3. At the second trial, over petitioner's objection, the prosecutor was allowed to seek first-degree murder convictions based on a felony-murder theory.

4. At the time petitioner was convicted, the failure to separately charge underlying offenses was error. *See Williams v. Vasquez*, 817 F.Supp. 1443 (E.D. Cal. 1993), *citing People v. Robertson*, 33 Cal. 3d 21, 47 (1982) [finding error to be harmless]; *People v. Velasquez*, 26 Cal. 3d 425, 434 (1980) [finding error to be harmless], *vacated*, 448 U.S. 903 (1980), *reinstated*, 28 Cal. 3d 461 (1981).

5. Subsequently, in *People v. Morris*, 46 Cal. 3d 1, 14 (1988), this Court determined that failure to separately plead special circumstances is not necessarily error. This decision was not announced until July 21, 1988, one year after petitioner was convicted at his second trial and approximately ten years after he was convicted at his first trial, and over a decade after the crimes were committed.

6. Thus, at the time of both of petitioner's trials, it was error not to charge separately the underlying felony of lewd conduct with a minor, if it was going to be used to prove a felony-murder special circumstance. Penal Code § 288; *see People v. Robertson*; *People v. Velasquez*. The only issue under *Robertson* and *Velasquez* is whether that error was harmful. As discussed below, hereit was grossly prejudicial. As discussed herein, doing so violated Double Jeopardy prohibitions. See Claims 11, 13, 15 and 16.

7. Doing so also violated the quoted portion of Penal Code § 190.1 which requires that the underlying felony be charged in any charge of felony-murder.

8. Had petitioner been charged with Penal Code § 288 separately, it is reasonably likely that petitioner would have been acquitted of that offense at the first trial, based on (1) the trial court's ruling that the special circumstance was not true and (2) that there was insufficient evidence to support that charge. See Claim 16.

9. Had petitioner been acquitted of the underlying Penal Code § 288 offense, the prosecution could not have proceeded with a felony-murder theory on Count III. Since evidence of premeditation and deliberation was lacking, petitioner would then have been acquitted of first-degree murder on Count III and would have been ineligible for death. Thus, petitioner was prejudiced by the failure to abide by the requirements of Penal Code § 190.1. These failures violated petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

10. In addition to the violation of federal constitutional principles, the violation of the statute was a violation of a state created liberty interest, which also constitutes a violation of federal due process. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

11. The failure to charge petitioner under Penal Code § 288 violated state law, and allowed the state courts to violate petitioner's rights not to be subjected to Double Jeopardy. Had the statute been complied with, petitioner would have been convicted of, at

most, second-degree murder on Count III.

CLAIM 12: Petitioner was Acquitted of Premeditated Murder in Count III and Retrying him Under that Theory Violated Double Jeopardy Principles.

1. In addition to the violations discussed above, retrying petitioner on a premeditated theory of first degree murder constituted a separate violation of Double Jeopardy principles, based on this Court's findings in *Memro I* that there was insufficient evidence of premeditated and deliberated murder.

2. In addressing the felony murder special circumstance, the trial court in the first trial referred to the lewd act component rather than the premeditated component in finding the special circumstance not true. (1978 RT 882). At trial, the parties had litigated the contention at trial of whether there was sufficient evidence of the underlying felony.

3. In its first opinion, this Court stated:

> Once inside, appellant took Carl Jr. into the bedroom, turned on "black strobe lights," and sat down on the bed. The boy stood adjacent to the bed, watching the lights blink on and off. Suddenly, when Carl Jr. announced his departure, appellant became angry, grabbed the clothesline and strangled him. Although appellant confessed to binding Carl Jr.'s hands, he was unable to remember whether he tied the boy's hands before strangling him, and no independent evidence established the timing of that act.
>
> No specific "plan" vis-a-vis Carl Jr. had been formulated.

Memro I, at 699.

4. This was a factual finding presumed correct under federal law. *See, e.g.,* 28 U.S.C. § 2254(e)(1). Thus, the doctrines of *res judicata* and collateral estoppel, in conjunction with Double Jeopardy principles, would operate to prevent the prosecution

from relitigating the case in order to prove a different set of facts. *See, e.g., Ashe v. Swenson*, 397 U.S. 436 (1970).

5. This factual finding precludes a finding of premeditation and deliberation. The killing of Carter resulted from a sudden burst of anger with no specific plan. This Court found as much when it noted that there was no evidence to establish the timing of the acts. Without such evidence, there is no sufficient evidence to find premeditation and deliberation. Thus, *Memro I* established that there was insufficient evidence of premeditation.

6. If there were any doubt about this finding, it is washed away by this Court's discussion of the sufficiency of the evidence of premeditation. Because of the trial judge's reference to the insufficiency of the evidence of the lewd act component of the special circumstance charge rather than the premeditation component, the parties on the first appeal focused solely on the sufficiency of the evidence of premeditation and deliberation. This is understandable because "the record suggests that the trial court believed the evidence of lewd or lascivious conduct to be less than convincing." *Memro I*, at 696, fn. 44. Thus, the tacit understanding of the parties was that the trial court had found insufficient evidence of the underlying felony while perhaps finding sufficient evidence of premeditation. On appeal then, petitioner challenged the sufficiency of evidence of premeditation necessarily found by the trial court.

7. This Court rejected this argument and stated:

The parties focus only on the evidence of premeditation and deliberation in

> their discussion of the sufficiency of the evidence to support the Carl Jr. first degree murder verdict. However, this court need not determine whether the evidence was sufficient on that theory, since substantial evidence supports the verdict on a felony-murder (attempted lewd or lascivious conduct (Penal Code § 288)) theory.

Memro I, at 695. This Court then proceeded to engage in a lengthy discussion of the evidence to demonstrate that there was sufficient evidence to support a felony-murder theory. This discussion included the facts cited above regarding the killing taking place as an angry reaction to Carter's desire to go home.

8. If this Court was correct that there was sufficient evidence of felony murder, then there was insufficient evidence of premeditation and deliberation. The trial court necessarily found evidence of one theory insufficient as a matter of law. This Court affirmatively stated that there was no "plan." *Memro I* at 699. By finding sufficient evidence of felony-murder, this Court implicitly found a lack of evidence of premeditation. Any other reading would amount to the substitution of this Court's factual opinions for that of the trial court, an intolerable and impermissible result.

9. Thus, *Memro I* establishes a separate basis for a Double Jeopardy claim than those discussed above. Whereas those claims stem directly from the trial court's ambiguous ruling which is now incapable of being resolved, this claim stems directly from this Court's ruling in *Memro I*. In sum, Claims 11 and 12 state Double Jeopardy claims that the trial court's ruling prevented retrial on either first degree murder theory. This claim states a Double Jeopardy violation based on this Court's implicit acquittal on a premeditated and deliberated murder theory which mandates the granting of habeas relief.

CLAIM 13: Trying Petitioner Under a Felony-Murder Theory for Count I Violated Double Jeopardy Since Petitioner Was Acquitted Under That Theory at the First Trial.

1. The jury was instructed pursuant to CALJIC 8.10, in relevant part:

> Defendant is charged in Counts 1, 2 & 3 of the information with the commission of the crime of murder, a violation of Section 187 of the Penal Code.
>
> The crime of murder is the unlawful killing of a human being with malice aforethought or the unlawful killing of a human being which occurs during the commission or attempt to commit a felony inherently dangerous to human life.

(CT 482).

2. The jury was also instructed pursuant to CALJIC 8.21, in relevant part:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission of or attempt to commit the crime of § 288 lewd act with a child, and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.

(CT 486).

3. Under these instructions, the jury was allowed to consider whether petitioner committed the murder charged in Count I under a felony- first degree murder theory. The trial court's instruction that "Count 1 charges murder in the second degree as a matter of law. This is for reasons which do not concern your deliberations and about which you must not speculate" did nothing to eliminate this first degree murder theory from their consideration. (See CT 507).

4. At the first trial, the court found that petitioner was guilty of only second-

degree murder in Count I. This finding by the court was an acquittal of first-degree murder and a rejection of the felony-murder theory as applied to Count I. Had the court found that petitioner killed Fowler during the perpetration of lewd conduct, the trial court would have found petitioner guilty of first-degree murder. Since the court did not do so and rejected a felony-murder theory as applied to Count I, the jury should not have been allowed to use that theory in Count I at the second trial.

5. The violation of Double Jeopardy principles was prejudicial. It allowed the prosecutor to secure a conviction under circumstances which otherwise would not have warranted one.

6. This error was particularly prejudicial in the penalty phase, where the prosecutor was able to successfully argue that petitioner had been convicted of three murders. Had this erroneous theory of guilt not been presented, there may have been only two murder counts which the jury had to assess.

7. This erroneous instruction violated petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

CLAIM 14: Denial of Petitioner's Right to Counsel at the Penalty Phase of the First Trial Deprived Petitioner of Due Process at the Retrial.

1. At the first trial in 1979, a conflict arose between petitioner and his counsel, Peter Williams, which intensified at the conclusion of the guilt phase. Petitioner explained to the trial court:

> Mr. Williams is no longer representing me, as I feel we have had a complete and total breakdown of communications.

> He refuses to represent my best interests in this matter and won't answer my questions pertaining to legal procedures to enable me to intelligently object to his tactics.
>
> There is and has been an on-going conflict between us and I am convinced that he has not faithfully and honestly carried out his duty to adequately investigate and to conscientiously defend me in this case.
>
> He has failed or refused to call and question or interview potential witnesses as requested by me, often after assuring me that he would do so.
>
> When I asked about my right to participate in my own defense he agreed that I did have that right but only as long as my wishes corresponded with his decisions.
>
> I have found it necessary to talk with his supervisor, a Mr. Donald Ellertson on two separate occasions, one of them involving what I consider to be a violation of the attorney-client privilege.
>
> Mr. Williams has repeatedly failed or refused to investigate certain aspects of the case, to subpoena certain records and other potential evidence and to interview and call potential witnesses that could have proven beyond any doubt that not only was my arrest improper but that many if not all of the police officers who testified committed blatant and willful perjury.
>
> Many of these same failures and refusals have already caused a considerable amount of what I believe will prove to be irreparable damage in this case. As a result I am discharging him at this time to prevent him from intentionally causing even further damage of that nature.

(1979 RT 894-895).

Petitioner asked that the Court appoint another attorney to represent him.

2. The Court did not want to discharge Mr. Williams and a lengthy discussion occurred which demonstrated the true nature of the conflict.

> THE COURT: Well, frankly, Mr. Memro, I have known Mr. Williams for quite a number of years and know that he is an excellent, good and – excellent trial lawyer and does his best for any client for whom he is appointed to represent. It is difficult

for me to conceive that he has failed to comply in the best interests of an attorney in representing you in this case. Now you are going to have to be a little more specific for this Court to excuse Mr. Williams from these services.

THE DEFENDANT: In what respect?

THE COURT: Well, you say that he refused to do certain things. I don't know what you are talking about.

THE DEFENDANT: I say that he has refused to interview certain witnesses, he refused to subpoena certain records that would have been pertinent to this case.

THE COURT: Well, what witnesses?

THE DEFENDANT: I can't get details on those things. I can't go into those details because it w

MR. WILLIAMS: If I might, Your Honor. I am obviously not–

THE COURT: Mr. Williams, you are not required to defend yourself.

MR. WILLIAMS: I understand that. I am trying to defend my client is what I am trying to do.

THE COURT: I have always found that you have always done so.

MR. WILLIAMS: I think Mr. Memro's view of what is in his best interests may well conflict with my view, but that is not– that is sort of the general reason why there may be a problem between us at this time. Specifically with respect to the motion that he is maki

THE COURT– Well, do you think that that conflict can be resolved in any way?

THE DEFENDANT: No.

THE COURT: I am not asking you, sir. I am asking Mr. Williams.

MR. WILLIAMS: Well, I think we have a basic difference in what we feel is in his best interests.

(1979 RT 895-897).

3. Ultimately, the trial court agreed to relieve Mr. Williams. The trial court

trailed the matter until the next day for the appointment of new counsel. (1979 RT 900). Prior to doing so, the Court noted that "I cannot permit him [Mr. Memro] to proceed in pro per" and "There is no circumstances under which he can. This is a death penalty case." (1979 RT 898).

4. The following day, the Court appointed Robert Villa to represent petitioner. (RT 902). Petitioner objected to Mr. Villa serving as counsel based on their conversations and stated that he saw no alternative other than to submit for sentencing on the previous proceedings, due to his lack of qualifications to serve as his own attorney. (1979 RT 903-904). The Court stated:

> The request to proceed in propria persona is denied.
> The Court cannot permit a person who feels that he is not qualified to do so to represent himself in a case where his life is at stake.

(1979 RT 904).

The court declined to relieve Mr. Villa and gave Mr. Villa his requested time to prepare. (1979 RT 905-913).

5. Upon returning to court, Mr. Villa explained that a conflict had "arisen between Mr. Memro and myself which go[es] to my ability to continue to represent Mr. Memro." Mr. Villa stated that he could not go into these matters with the trial court, which was sitting as the trier of fact. (1979 RT 914). The trial court transferred the matter to Judge Allen. (1979 RT 916). Upon Mr. Villa's request, he was removed as counsel. (1979 RT 916). The court ordered Mr. Villa to return the transcripts, reports and correspondence to petitioner. (1979 RT 918-919).

6. The court then asked if petitioner was ready to proceed and petitioner said he was not. Petitioner believed that the court would appoint new counsel. The court said that unless he could retain his own attorney, he would have to proceed on his own. (1979 RT 920). The court gave petitioner nine days to prepare himself for the penalty phase. (1979 RT 925).

7. At the next appearance, petitioner again requested a continuance and appointment of counsel. The court refused this request. (1979 RT 927). Petitioner reminded the court that Mr. Villa was relieved on his own motion. Petitioner also reminded the court that he was not competent to represent himself. (1979 RT 928). Despite the court's prior pronouncements that under no circumstances could a defendant represent himself in a capital case, the court denied petitioner's request that counsel be appointed. (1979 RT 928). Petitioner explained that he lacked adequate resources at the county jail and that even if he had adequate resources, he was not qualified to represent himself. (1979 RT 929). The court refused to appoint an attorney. (1979 RT 929). The court offered an additional continuance and petitioner reiterated that regardless of the amount of time, he was unqualified. (1979 RT 930). The trial court continued the matter 21 days and appointed an investigator for petitioner. (1979 RT 932).

8. Petitioner was unable to proceed at the next appearance, due to his inability to confer with the appointed investigator. (1979 RT 935). The trial court denied petitioner's request for a continuance. (1979 RT 937). Petitioner again renewed his request for appointed counsel, which the court denied. (1979 RT 939-41).

9. Petitioner again reminded the court that he was not competent to represent himself as the court had previously found. (1979 RT 941). The court reversed its prior statements, *see above*, and said that the court only found that petitioner did not feel he was competent to represent himself. (1979 RT 941). The trial court also stated:

> I also know, Mr. Memro, via grapevine, you might say, that you have an intelligence quotient around 120.
>
> You are not an incompetent mental case, so you certainly have the mental capacity to represent yourself.
>
> Consequently you are going to do it.

(1979 RT 941-42).

The court offered no source for its knowledge of petitioner's IQ or authority holding that the Sixth Amendment does not apply to people with an IQ of 120 or above.

10. The penalty phase began with petitioner representing himself. The prosecution rested on the evidence presented during the guilt phase. Petitioner stated that because he was unqualified to represent himself and the court refused to ensure his access to a licensed investigator, he had nothing to add. (1979 RT 942-43).

11. The prosecutor argued that if petitioner did not deserve the death penalty, there was no case in which it would ever be justified. He urged the court to impose the death penalty. (1979 RT 944-45). Petitioner stated he was not qualified to proceed. (1979 RT 945). The court construed petitioner's statements as his refusal "to make any summation whatsoever in his own defense." (1979 RT 945). The court then entered a death verdict against petitioner. (1979 RT 949).

12. The complete denial of counsel violated petitioner's Sixth Amendment rights. "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 668 (1984). The Supreme Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding. *See, e. g., Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612-613 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (*per curiam*); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475-476 (1945).

13. The trial court refused to appoint counsel to represent petitioner in the penalty phase. There can be no doubt but that the penalty phase is a critical phase of the trial. *See, e.g., Estelle v. Smith*, 451 U.S. 454 (1981); *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001); *Gerlaugh v. Stewart*, 129 F.3d 1027 (9th Cir. 1997) (applying *Strickland* and *Cronic* to penalty phase representation).

14. The trial court's sole ground for not appointing counsel was that two prior attorneys had been dismissed. Peter Williams had been relieved after an irreconcilable conflict of interest arose. (1979 RT 900). This removal was necessary and proper under the Sixth Amendment. *See People v. Marsden*, 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970). The essence of a *Marsden* motion is that appointed counsel's representation

has in some significant measure fallen below the level required by the Sixth Amendment. *See Schell v. Witek*, 218 F.3d 1017, 1021 (9th Cir. 2000).

15. Robert Villa was relieved upon his own request. (1979 RT 916). The court attributed, without factual basis, Villa's motion to be relieved to petitioner and repeatedly refused to appoint counsel despite petitioner's numerous requests.

16. The trial court's refusal to appoint counsel to represent petitioner in the penalty phase was a gross violation of petitioner's Sixth Amendment rights. The resulting penalty phase trial violated petitioner's rights to Due Process. Capital cases require heightened scrutiny under the Eighth Amendment, which was also violated.

17. The trial court's gross violation resulted in a penalty phase trial which was a foregone conclusion. Petitioner was unqualified to represent himself and presented no evidence on his behalf. Abundant evidence existed which, if presented, was reasonably likely to result in a sentence of life without parole instead of a death sentence. Had the trial court sentenced petitioner to life without parole instead of death, double jeopardy principles would have barred the prosecution from seeking death after the reversal of the guilt phase verdict.

18. The Supreme Court has explained:

> Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a

> summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty.

Rochin v. California, 342 U.S. 165, 169 (1952) (internal quotations and citations omitted) (reversing state court conviction "obtained by methods that offend the Due Process Clause").

19. These violations amounted to conduct which was "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

20. In sum, allowing a retrial of the penalty phase against petitioner after what was done at the prior penalty phase was a "constitutionally intolerable event." *Herrera v. Collins*, 506 U.S. 390 (1993) (O'Connor, J. concurring); *see also Lambert v. Blackwell*, 962 F.Supp. 1521 (E.D. Pa. 1997), *rev'd on other grounds, Lambert v. Blackwell*, 134 F.3d 506 (3rd Cir. 1997). Petitioner should have been subject to, at most, a sentence of life in prison without parole.

21. This error also prejudiced petitioner in the guilt phase at the retrial. Petitioner's jury was "death-qualified" pursuant to *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968). In *Witherspoon*, the Court recognized that the *voir dire* practice of "death qualification" -- the exclusion for cause, in capital cases, of jurors opposed to capital punishment -- can dangerously erode this "inestimable safeguard" of representative juries by creating unrepresentative juries "uncommonly willing to condemn a man to die." *See also Adams v. Texas*, 448 U.S. 38, 44-45, 48-50 (1980).

22. Research has determined that "death-qualified" juries are often particularly prone to convict defendant's as well. *See, e.g.*, H. Zeisel, Some Data on Juror Attitudes

Toward Capital Punishment (University of Chicago Monograph 1968) (Zeisel); W. Wilson, Belief in Capital Punishment and Jury Performance (unpublished manuscript, University of Texas, 1964) (Wilson); Goldberg, Toward Expansion of *Witherspoon*: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 53 (1970) (Goldberg); Jurow, New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971) (Jurow); and Cowan, Thompson, & Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 Law & Hum. Behav. 53 (1984) (Cowan-Deliberation); Louis Harris & Associates, Inc., Study No. 2016 (1971) (Harris-1971); Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. Colo. L. Rev. 1 (1970); Bronson, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California, 3 Woodrow Wilson L. J. 11 (1980); Fitzgerald & Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav. 31 (1984); and Precision Research, Inc., Survey No. 1286 (1981). In addition, McCree introduced evidence on these issues from Thompson, Cowan, Ellsworth, & Harrington, Death Penalty Attitudes and Conviction Proneness, 8 Law & Hum. Behav. 95 (1984); Ellsworth, Bukaty, Cowan, & Thompson, The Death-Qualified Jury and the Defense of Insanity, 8 Law & Hum. Behav. 81 (1984); A. Young, Arkansas Archival Study (unpublished, 1981); and various Harris, Gallup, and National Opinion Research Center polls conducted between 1953 and 1981.

23. Petitioner's jury should not have been death-qualified, since he should not have been retried in the penalty phase due to the trial court's gross-violation of petitioner's Sixth Amendment rights. By allowing the retrial of the penalty phase, the court improperly forced petitioner to undergo a guilt trial with a jury that was conviction prone. That jury should not have been death qualified, since petitioner should not have been death eligible.

Trying petitioner in the guilt phase under these circumstances violated petitioner's rights to a fair trial by an impartial jury from a cross-section of the community. Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated.

CLAIM 15: Petitioner's Rights were Violated by the Prosecutions' Use of Perjurious Jailhouse Snitches.

1. After this Court issued a remittitur and petitioner's case was sent to Los Angeles County Superior Court for retrial, petitioner was transferred from San Quentin State Prison to the Los Angeles County Jail. In August 1985, shortly after petitioner arrived in Los Angeles, both petitioner and trial counsel Larkin requested that petitioner be held in the high-security, individualized cells at the jail. The request was made for security reasons and because of the fear of jailhouse informants. Mr. Larkin repeatedly requested that petitioner be protected from possible inmates/government agents.

2. On September 25, 1985, Mr. Larkin again requested that petitioner be placed in protective custody and given special transportation. The trial court granted the request for protective custody and denied the request for special transportation. On September 27, 1985, the court recognized that petitioner had not yet been placed in protective custody.

3. On December 3, 1986, trial counsel informed the court that petitioner had still not been placed in the cells specified by the court (Module 7000). The court once again ordered that petitioner be placed in a Module 7000 cell and still the Sheriff's Department refused to comply.

4. During the period when petitioner was awaiting trial, **the Sheriff's Department intentionally placed known jailhouse informants in cells near petitioner's cell and near petitioner during transportation to and from court.**

5. On January 7, 1987, Los Angeles County Jail inmate Howard D. Stewart (Booking Number 8456951) was called to the attorney visiting room to see an investigator regarding a matter unrelated to this case. Sidney Storch, an informant who was listed on the

prosecution's witness list in petitioner's case, was called to the attorney visiting room at the same time. Mr. Stewart was taken to an attorney booth. Laid out before Mr. Stewart were the files, reports and photographs relating to the case against petitioner. Mr. Stewart began to review the materials, which were turned to face where Mr. Stewart was sitting. Moments later, Harold Baldwin, a deputy sheriff assigned to the attorney visiting room, indicated to the individual seated across the table from Mr. Stewart that there was an error and Mr. Stewart should not be in that room. The individual in the room identified himself as an investigator from the District Attorney's Office and said he wanted to talk to Sidney Storch. Deputy Baldwin stated that the inmate in the room was not Sidney Storch. The investigator then immediately shut the files and did not say another word to Mr. Stewart.

6. After Mr. Stewart was removed from the room, Mr. Stewart observed Sidney Storch meeting with the same investigator and obviously reviewing the files and reports which had been spread out on the table previously. Report of Investigator Scott L. Thompson/Declaration of Howard D. Stewart, Exhibit S-D.

7. Records of the Los Angeles County Jail indicate that on January 7, 1987, Sidney Storch met with D. A. Investigator R. Hilleary in the attorney room. On the same day, Storch purportedly provided to the prosecution for the first time an incriminating statement allegedly made by petitioner.

8. Leslie Vernon White, the "Premier LA Snitch" Celebrity, an inmate known to the Los Angeles Sheriff's Department as someone who falsely informed on other inmates for the District Attorney's Office, was housed along with petitioner in "high power" (Module 1700) at the Los Angeles County Jail from August, 1986, to December, 1986. In November, 1986, White learned from Michael Steriotti, another known jailhouse informant, that petitioner was accused of killing some kids and that Deputy District Attorney Phil Millett was assigned to prosecute the case. Without knowing any other information, White telephoned Mr. Millett and an interview was scheduled for December 4,

1986 at the Norwalk courthouse.

9. Millett then arrived for a personal interview with White accompanied by Lloyd Carter, a District Attorney investigator who, prior to his retirement from the South Gate Police Department, had interrogated petitioner and obtained his alleged confession to the capital offense in 1978. White allegedly told Millett, in the presence of Carter, that petitioner had admitted killing some kids. White further stated that petitioner had been screaming that Anthony Cornejo, another known informant, had snitched on him and that petitioner had confided in White that petitioner had in fact made certain admissions to Cornejo. **White's statements regarding petitioner were 100% false.**

10. Millett appeared disappointed and unsatisfied with the information. Before he and Carter left the interview, they asked White if White had told him on the phone that petitioner had admitted that his confession to the police was voluntary, that it had not been coerced or beaten out of him and that petitioner was only now claiming coercion in an attempt to defeat the prosecution case. White had made no such comment to Millett on the phone but understood Mr. Millett's question to be suggestive of the testimony Millett wanted White to provide. White then falsely acknowledged to Millett that White had stated on the phone that petitioner admitted that his confession was voluntary. Declaration of Leslie Vernon White, Exhibit S-E.

11. The Los Angeles County Sheriff's Department deliberately placed known informants in locations where they could elicit, or claim to have elicited, confessions and admissions from petitioner and other inmates, particularly high-profile inmates and those charged with capital offenses. The Los Angeles County Sheriff systematically failed to establish adequate procedures to control improper placement of inmates, with the foreseeable result that false claims of confessions or admissions would be made. Exhibits B-K.

12. The participation of the Los Angeles County District Attorney's Office and

Sheriff's Department in the procuring of false and unreliable evidence in this case was not unusual, isolated occurrences. In particular:

a. During the time period when petitioner was incarcerated at the Los Angeles County jail, the Los Angeles District Attorney's Office systematically sought out and presented false and unreliable jailhouse informant testimony. Exhibit B, C, E.

b. Prosecution witness Cornejo in the present case described to counsel and an investigator in the Bittaker case (*People v. Bittaker*, 48 Cal.3d 1046 (1989)) a practice in which several jailhouse informants would receive a "class" on a case and would then attempt to obtain corroborating statements from the defendant. That failing, they would then, under the tutelage of the police and prosecutor, create a "script" under which each would testify to particular statements heard from the defendant. Exhibit B.

c. Furthermore, the Los Angeles County District Attorney's Office systematically failed to fulfill the ethical responsibilities required of a public prosecutor by its deliberate and informed decision to seek and use false jailhouse informant testimony. Exhibit C, Report of Los Angeles County Grand Jury.

13. The presentation of false and perjurious jailhouse informant testimony prejudicially and unfairly influenced and effectively dictated petitioner's decisions about whether to testify in his own defense and whether to raise at trial the voluntariness of his alleged confession. The testimony of informant Anthony Cornejo prejudicially and unfairly influenced the outcome of the Evidence Code § 204 hearing on the admissibility of the confession. Absent the government's outrageous misconduct in eliciting false and perjurious statements and testimony of jailhouse informants, the result of the proceedings would have been more favorable to petitioner at both the guilt and penalty phases.

CLAIM 16: Petitioner's Rights were Violated by the False and Perjurious Testimony of Anthony Cornejo.

1. Petitioner's conviction, sentence of death and confinement are unlawful and were obtained in violation of his rights to due process, to a fair trial, to effective assistance of counsel, to be free from unlawful, uncounseled interrogation, to be free from outrageous government misconduct and to have a capital trial free from false and unreliable evidence, as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments, the analogous provisions of the California Constitution and Penal Code § 1473, due to the false and perjurious testimony of Anthony Cornejo presented at the section 402 hearing on the admissibility of the confession.

2. On April 13, 1987, over petitioner's objection, the prosecution called Anthony Cornejo to testify at a Section 402 hearing to determine the voluntariness of petitioner's alleged admissions to the police. Cornejo testified that on the bus between court and jail, petitioner admitted that he had fabricated his claim that the statements made to the police were coerced. Cornejo's testimony supported the prosecution's contention that petitioner's confession was voluntary.

3. Following the Section 402 hearing, the trial court ruled that petitioner's confession would be admitted. The court made the following finding: "Based upon the totality of the evidence, the court finds beyond a reasonable doubt the confession was free and voluntary."

4. Cornejo's testimony was false. Petitioner never spoke with Cornejo about any legal issues. Cornejo obtained the information to fabricate his statement from the published opinion of this Court in *Memro I.*

5. Introduction of Cornejo's false and perjurious testimony unfairly and prejudicially led the court to conclude that petitioner's confession was voluntary and that petitioner's claims regarding the coercive conduct of the interrogating officers were

untrue. Absent Cornejo's testimony, the court would have entertained a reasonable doubt as to the voluntariness of the confession. Furthermore, Cornejo's false and perjurious testimony prejudicially and unfairly influenced and effectively dictated petitioner's decisions regarding whether to testify in his defense and whether to raise the voluntariness of the confession at trial. In the absence of Cornejo's false and perjurious testimony, the result at the guilt and penalty phase of the trial would have been more favorable to petitioner.

6. This Court's remand for a new trial rather than only for a new determination of voluntariness of the confession was based upon the principle that voluntariness of the confession may be raised under California law as a factor for the jury in determining its believability, as well as a factor for the judge in determining its admissibility and a recognition that withholding of evidence on voluntariness of the confession was prejudicial both as to guilt and as to penalty. *See Memro I*, 38 Cal.3d 658; California Evidence Code § 405(b). This Court determined that under California law and the facts of this case, evidence potentially prejudicial with regard to a determination of voluntariness was also potentially prejudicial with regard to a determination of guilt. *Id.*

7. The government's creation and exploitation of the perjurious informant testimony deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

C. CLAIMS RELATING TO DISCOVERY.

CLAIM 17: Failure to Provide Discovery of the Prior Citizen Complaints Against the Police Officers Denied Petitioner a Fundamentally Fair Trial.

1. Following petitioner's initial conviction in this case, this Court reversed his conviction, holding that petitioner had demonstrated good cause for discovery of police personnel records of complaints of excessive force because the information was relevant to his claim that his confession was coerced. *Memro I*, at 674-684.

2. At petitioner's retrial, the trial court ruled that the records of the South Gate

police officers involved in petitioner's arrest and interrogation were appropriate for discovery pursuant to *Pitchess v. Superior Court*, 11 Cal.3d 531, and this Court's earlier decision in this case (RT 295). The court erroneously denied counsel's request for discovery of files related to officers other than the four directly involved in the interrogation, Sims, Gluhak, Carter, and Greene. As to those four officers, however, the motion was granted. (RT 1950).

3. **Despite the long legal battle over these records and the fact that they had been deemed discoverable, the records were destroyed by law enforcement.**

4. The following testimony was elicited at the hearing regarding the destruction of these records.

a. According to Officer Huntrods, the custodian of records at South Gate, the files of the police officers involved in this case were destroyed pursuant to Government Code § 34090. The Chief of Police initiated the destruction in July 1984 by asking the City Attorney to so act. (RT 308-309).

b. At that time, the appeal in *Memro I* had been fully briefed and orally argued before the state supreme court. The trial court acknowledged that oral argument in *Memro I* occurred on May 7, 1984, and that the records were ordered destroyed on July 3, 1984. The decision in *Memro I* was rendered on June 6, 1985. (RT 2023).

c. Huntrods testified that when a citizen's complaint is received at the station, it is normally taken by the watch commander, who assigns it to the administrative sergeant and one or two investigators. Depending upon the type of complaint, the officer involved may not be contacted until near the end of the investigation. (RT 311).

d. Huntrods was aware that the South Gate branch was the subject of allegations of aggressive behavior and excessive force. (RT 312).

e. Huntrods testified that, in deciding to destroy the records, he considered only whether there were any civil cases pending against the officers. Had there been any, he claimed he would not have destroyed the records. Although he acknowledged that petitioner's capital case was probably the best-known case at South Gate, he never contacted the District Attorney's office or the Attorney General's office to ask about destruction of records pertaining to the case. (RT 314-317).

f. Sgt. Ludwick, the Administrative Sergeant at South Gate from 1972 to 1978, stated that when a formal complaint was filed against an officer, the officer would eventually be confronted, although the officer was not always told about the complaint during the initial screening period. (RT 496).

g. Raymond Lilley testified that complaints received in the form of a letter were not processed as formal complaints so an officer might never know of the complaint. (RT 508).

5. Over objection, the trial court permitted the officers named in the *Pitchess* motion to testify regarding their knowledge of any complaints against them.

a. Detective Sims testified that he was an officer at South Gate from 1972 to 1983. He recalled one complaint filed against him, which had to do with the physical arrest of the complainant. He could remember no other details. (RT 318-320).

b. Detective Carter was employed at South Gate from 1958 to 1986. He testified that he had never been confronted with complaints filed against him for aggressive behavior, violence or excessive force, although he had been disciplined for other types of misconduct. (RT 326-327).

c. Carter knew that during the first trial in this case, a motion had been filed requesting his personnel file. He knew that the case was pending on appeal at

the time his file was destroyed. Before the file was destroyed, the Attorney General discussed the case with Carter on February 11, 1982. (RT 2021). The matter against Memro was the biggest case he had worked on in over 25 years as a police officer and it was one of the most significant ever out of South Gate. (RT 333-343).

d. Louis Gluhak began working at South Gate in 1967. He stated that he was not aware of any complaints that he had personally used excessive force on citizens but acknowledged that he was named as a defendant in a case involving a complaint over the use of Mace. (RT 355, 358).

e. Dennis Greene worked at South Gate from 1973 to 1980. His testimony that he had never been confronted with complaints against him for violent or aggressive behavior (RT 543) was proven false by the testimony of former District Attorney Michael Carney, who testified that he had prosecuted a case where Greene had used excessive force in making an arrest. (RT 363).

f. In addition, Officer Greene then explicitly told Carney that he received a restricted duty assignment for breaking another individual's jaw in making a traffic stop. (RT 363-366, 526). Greene stated that he recalled that one defendant was unhappy with the way he had effected the arrest but he was not aware of any complaint being filed against him. He recalled two incidents in which he broke the jaws of suspects during traffic stops. According to Greene, no complaints were filed in either case. (RT 591-596).

6. The court found that Carter was aware of the appeal which included claims regarding the officer's personnel files. (RT 340). It held, however, that the defense had not established bad faith on the part of the officers in destroying the records. Specifically, the court noted "although the scenario or the chronology of events is fortuitous, I don't know if it sustains proof of bad faith. You cannot presume bad faith." (RT 2023, 2024). The court

therefore denied any type of sanction for the loss of records. (RT 2025-2026).

7. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court stated a basic rule:

> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Id. at 87; *see also Giglio v. United States*, 405 U.S. 150, 153-154 (1971).

8. That petitioner was entitled to the police records in issue cannot be disputed. The trial court correctly ruled that petitioner could discover the materials and based its ruling upon the finding of this Court, reversing petitioner's former conviction, in which this Court reasoned:

> The Evidence Code clearly supported appellant's theory of discovery. Discovery might lead to evidence of habit or custom admissible to show that a person acted in conformity with that habit or custom on a given occasion [citation] "Habit" or "custom" is often established by evidence of repeated instances of similar conduct [citation]. Plainly, evidence that the interrogating officers had a custom or habit of obtaining confessions by violence, force, threats or unlawful aggressive behavior would have been admissible on the issue of whether the confession had been coerced.
>
> Furthermore, evidence of reputation, opinion, and specific instances of conduct is admissible to show, inter alia, motive, intent, or plan [citation]. Evidence that the interrogating officers had acted according to a plan or with a motive to coerce appellant's confession, or had intended to do so, would have been relevant to appellant's claim of involuntariness. Reputation or opinion evidence would also have been relevant on this issue . . . [¶] Moreover, counsel's declaration satisfied Pitchess and Evidence Code section 1043. The declaration asserted that the confession had been coerced by promises of leniency and threats of violence. Evidence of coercion is relevant both to the admissibility of a confession and the weight it is to be given by the trier of fact. [Citations.] Since evidence concerning complaints of prior violence by interrogating officers might have been admissible evidence on that question, counsel's allegations sufficiently "set forth the materiality" of the requested information. [Citation] . . . [¶] In sum, under Pitchess and the Evidence Code, appellant demonstrated good cause for the requested discovery.

Memro I, 38 Cal.3d at 681-684.

9. Following its proper holding that petitioner was entitled to the requested

discovery in this case, the trial court erred in failing to impose sanctions upon a showing that the files had been intentionally destroyed. The court held that petitioner had not proven "bad faith" by the state in the destruction of the records and therefore it could not impose sanctions. However, the absence of "bad faith" does not preclude the imposition of sanctions.

10. The testimony of the South Gate Police Department offered on the issue of the destruction of records showed no "rigorous and systematic procedures designed to preserve evidence." According to Officer Huntrods, the Custodian of Records, there was no wholesale, indiscriminate destruction of records. Rather, he considered whether there were any **civil cases** pending against an officer prior to the destruction of that officer's file. He just as easily could and should have determined whether any criminal cases were pending in which the records might be relevant.

11. The sequence of events concerning the records is highly suspicious. The Attorney General discussed the case with at least one of the officers involved during the briefing process. The case was argued before this Court on May 7, 1984 and the records were destroyed almost two months later, eleven months prior to this Court's decision. Importantly, several of the officers involved acknowledged that this case was the most notorious case ever to come out of the South Gate Police Department. It is therefore inexcusable, not to mention prejudicial to petitioner, that the records that were the primary issue on appeal were destroyed. Irrespective of any showing or absence of bad faith, it is outrageous that no sanction was imposed for such an action, especially when a man's life is at stake.

12. The fact that there were complaint records to destroy supports the conclusion that the records contained exculpatory material because they would assist petitioner in the motion to exclude his confession. Some of the officers acknowledged that past complaints had been made against them; in addition, there was evidence presented

that past complaints had in fact been made against the officers for excessive use of force. The conclusion is that the records did contain information helpful to the defense and their destruction required the imposition of sanctions under *Brady*.

13. Assuming, *arguendo*, that a bad faith standard should apply to this case, the court's conclusion that there was no bad faith by the prosecution is not supported by the evidence. The issue regarding discovery of the records was contested in the first trial and was a central basis for appeal.

14. Everyone involved knew that the records were of great importance in this death penalty case. The police acknowledged that they had contact with the legal representatives of the state and were kept informed of the status of the matter while it was pending before this Court. Despite the knowledge by the officers in charge that this matter was still pending, they purposely decided to destroy the records. Based on this record, there is no support for the trial court's conclusion that the destruction was not done in bad faith. Therefore, under the state and federal constitutions, imposition of sanctions for this action by the police department is mandated.

15. Finally, the police department admitted that in civil cases they retain the records until the case is fully resolved on appeal but claimed that rule did not apply in criminal cases, even a death penalty matter.

a. Because the penalty of death is qualitatively different from a sentence of imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

b. Because a constitutional right is affected by the destruction of the records, this court must apply a harmless beyond a reasonable doubt test under *Chapman v. California*, 683 U.S. 81 (1967). Under this test, it is clear that the failure of imposition of a sanction cannot be deemed harmless.

Exclusion of the confession would leave absolutely no evidence connecting the petitioner to the offenses charged.

c. Additionally, the failure to impose sanctions against the prosecution on the issue of prior complaints of excessive force at the hearing on the suppression of the confession is also not harmless. The prosecution cannot show that the court's decision on this issue would have been the same had there been such a sanction imposed. Thus, even for this lesser sanction the result must be the same and the confession must be excluded.

16. In *Memro I*, this Court reversed petitioner's conviction because of the trial court's failures to order discovery of the key records. Specifically, this Court stated:

> It is clear that prejudice exists in this case. The trial court was required to determine from the evidence presented at the hearing on appellant's motion to exclude the confession whether it was voluntary beyond a reasonable doubt. [Citation.] Since the denial of discovery deprived appellant of the possibility of presenting evidence on that issue, the trial court did not make as informed a determination as it might have if discovery had been granted. [¶] . . . Under the facts of this case, it is reasonably probable that discovery would have led to admissible evidence of sufficient weight to affect the trial court's determination on the voluntariness of the confession.

Memro I, at 684-685.

17. The trial court on retrial was similarly deprived of the evidence relating to police misconduct, albeit for different reasons. Thus, the prejudice remains the same as it did when this Court reversed in *Memro I*. As to the weight to be accorded the confession, this Court noted in *Memro I*:

> [E]vidence of coercion would have been admissible at trial on the question of what weight the trier of fact should have given the confession. [Citation.] Obviously, the trial court's failure to accord appellant an opportunity to discover evidence of coercion precluded him from presenting any such evidence as to whether the confession should have been believed, even assuming it was properly admitted.

Id. at 684 n. 28.

18. Contrary to the findings of the trial court, the destruction of any citizen

complaint records could not be mitigated through other means. At the hearing concerning the destruction of the records, it was established that allegations of aggressive behavior and force had been made in petitioner's case. The destruction of the records, however, precluded petitioner from investigating these complaints.

19. Officer Gluhak claimed hewas not "aware" of any accusations. Officers Carter and Greene claimed they were never "confronted" with any complaints. First, none of the officers involved could plainly state that there were no complaints filed against them. Second, the self-serving nature of their testimony was telling.

20. The evidence was clear that the apprehension and prosecution of petitioner resulted in the most notorious case to ever come out of the South Gate Police Department. The officers involved thus had great motivation to be less than forthcoming with any information regarding the use of excessive force against citizens. The unreliability of the police officers' testimony is also demonstrated by the impeachment of Greene's testimony that he was never involved in the use of excessive force. Also, the prosecutor who said he prosecuted a case where Officer Greene had harmed somoeone.

21. Because of the court's failure to impose an appropriate sanction or any sanction at all for the destruction of police records, petitioner's convictions must be overturned. The absence of any instruction precluded petitioner from questioning the validity of the confession before the jury. The alleged confession was the critical piece of evidence condemning petitioner, and it was the only evidence offered against him on Counts I and II. For these reasons, petitioner was denied his due process rights under the federal and state constitutions.

CLAIM 18: Petitioner's Rights Were Violated by the Destruction of the South Gate *Pitchess* Records.

1. This Court reversed petitioner's initial convictions, holding that petitioner demonstrated good cause for discovery of police personnel and psychiatric records of

complaints of excessive police force because the information was relevant to his claim that his confession was coerced. *Memro I*, at 674-684.

2. At petitioner's retrial, the trial court ruled that the records of the South Gate police officers involved in petitioner's arrest and interrogation were discoverable pursuant to *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974) and this Court's opinion in *Memro I*. The trial court improperly denied counsel's request for discovery of files related to officers other than the four directly involved in the interrogation; Sims, Gluhak, Carter, and Greene. As to those four officers, however, petitioner's motion for discovery was granted.

3. Despite the notoriety of petitioner's case including the long battle over the discovery of these specific records, the prosecution notified petitioner and the trial court that the South Gate Police Department destroyed the records. The Chief of Police of South Gate initiated the destruction in July, 1984. At that time, the appeal in *Memro I* had been fully briefed and orally argued before this Court. The trial court found that oral argument in *Memro I* occurred on May 7, 1984 and the records were ordered destroyed on July 3, 1984.

4. Officer Huntrods, the custodian of records at South Gate, was aware that allegations of excessive force had been made against the South Gate Police Department. Nonetheless, in deciding to destroy the records, Officer Huntrods claimed to have considered only whether there were any civil cases pending against the officers.

5. Petitioner's case was the most well-known, high-profile case in South Gate at the time. Police Chief Robert Stewart, who initiated the destruction, personally responded to the allegation that petitioner's confession was coerced. It was Chief Stewart who initiated the destruction of the citizen complaints. Exhibit S-C, "Police Chief Charges Public Defender with Unethical Conduct," Sun Reporter, January 19, 1979, Exhibit S-C.

6. Sgt. Carter knew that his personnel jacket had been requested in the first trial in this case. Sgt. Carter also knew that this case was pending on appeal at the time his file

was destroyed. Before Sgt. Carter's file was destroyed, the Attorney General contacted him at least twice and the other officers concerning this case. This case was the biggest case Sgt. Carter had worked on in over 25 years as a police officer and it was one of the most significant cases ever out of South Gate.

7. Officer Greene testified that he had never been confronted with complaints against him for violent or aggressive behavior. Nonetheless, former Deputy District Attorney Michael Carney testified that he *prosecuted* a case where Officer Greene had used excessive force in making an arrest. Officer Greene then, and only then, admitted to Mr. Carney that he, Greene, received a restricted duty assignment for breaking another individual's jaw in effecting a traffic stop in yet another case.

8. The destruction of the prior citizen complaints against the police officers involved in the arrest and interrogation of petitioner was intentional and was done in bad faith. The records were destroyed by the South Gate Police Department while responsible parties at the South Gate Police Department knew that the discoverability of those records was an issue pending before this Court. Sgt. Carter was aware of the appellate process and had been contacted by the Attorney General's office at least twice during the pendency of the appeal and prior to the destruction of the *Pitchess* materials. The records of prior citizens' complaints were clearly material and exculpatory. The government's actions in destroying the evidence were intentionally designed to, and did in fact, deprive petitioner of material exculpatory evidence that would have demonstrated the coerced, false, and unreliable character of petitioner's alleged confession.

9. No sanction was imposed on the prosecution as a result of the intentional destruction of the prior citizen complaints.

10. Had petitioner been provided with discovery of such prior complaints, he would have been able to impeach the testimony of the arresting and interrogating officers and establish that his confession was involuntary and the product of illegal coercion.

Disclosure of the prior citizen's complaints would have produced a result more favorable to the petitioner in the guilt and penalty determination.

11. The government's failure to provide discovery of the records initially and its subsequent misconduct in destroying the citizen's complaint records deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

CLAIM 19: The Prosecution Violated Petitioner's Rights by Failing to Disclose Approximately 400 Pages of Discovery.

1. No physical evidence connects petitioner to the crime scene. The failure to provide discovery of crucial evidence regarding witnesses, other suspects, and basic factual information regarding Counts I and II, together with the loss of evidence regarding photo line-ups and other suspects and the failure to disclose reports about the 1976 investigation of petitioner, deprived petitioner of the ability to investigate the case thoroughly, to prepare and present a defense, to effectively cross-examine witnesses regarding the identification of petitioner, and to present evidence of third-party culpability.

2. On January 8, 1979, prior to petitioner's first trial, the trial court granted petitioner's discovery motion and issued an order compelling the prosecution to provide to the defense a number of items, including:

> 9. Photographs or pictures that have been exhibited to the witnesses for the purposes of establishing the identity of the perpetrator of the crime.
>
> . . .
>
> 11. All notes or memoranda, handwritten or typed, by police officers or other investigating officers of their conversations with persons pertaining to the investigation of this matter.
>
> . . .
>
> 13. Names and addresses of all witnesses to, or who have knowledge of, the crime or event leading to the commission thereof.
>
> 14. Copy of crime reports, together with all reports written by officers investigating the crime involved in the above entitled action.
>
> . . .

17. Names and addresses of all persons arrested as suspects in the investigation of the above entitled case.

18. Names and addresses of all persons interviewed by the District Attorney's Office its investigators or agents, or any other law enforcement agency known to the District Attorney or his representatives in relation to this case.

3. Despite this order, approximately 400 pages of materials generated and gathered by the Bell Gardens Police Department in connection with the murders of Scott Fowler and Ralph Chavez were not turned over to defense counsel at the first trial. Under the above order, the prosecution was required to disclose all such material.

4. Bell Gardens Police Officer Don Barclift prepared reports regarding the murders charged in Count I and II. At the instruction of Deputy District Attorney David Feldman, Barclift intentionally failed to disclose hundreds of pages of reports, despite their clear relevance to petitioner's case. As shown in Exhibit S-A, the reports, all of which had been withheld by the District Attorney and police at the first trial included a great deal of potentially exculpatory information that was never investigated by trial counsel. In particular, the District Attorney and police refused to disclose the following exculpatory information:

a. A report that witness Jose Feliciano, who purportedly identified petitioner at the second trial (for the first time) as having been present at the scene, had been shown various photo line-ups and identified persons including Charles Michael Lohman and Craig Crowder, who was already a suspect in the homicides.

b. A report of an interview of Richard Francis Hayden (DOB 4/29/17, approximately 59 years old at the time of the Fowler and Chavez homicides), who admitted that: he had lived with Fowler, he knew other adult males who took Fowler fishing, he had known the Fowler family for a decade, he had previously had sexual relations with "every Fowler boy," and he was known to

the family as "Uncle Dick." Hayden also stated that the only other adult male with whom he knew Fowler to associate was Jim Luna.

c. A report of an interview with Nick Allikas, on probation for "playing with boys" in violation of Penal Code § 288 ("lewd or lascivious acts with a child under age 14"), who knew Hayden to have had sexual relations with Fowler and to have performed sexual acts on the Fowler boys when they were in diapers.

d. A transcript of an interview of Mary Marie Merk (DOB 4/20/59, a Bell Gardens "Police Explorer" with two years' experience), who saw victim Chavez and Nick Allikas together at the Bell Gardens Taco Bell on the night of the murders at 9:25 p.m. She said she could "positively ID" both, and specifically identified victim Chavez and Allikas by photograph. Her positive identification makes the story in petitioner's alleged confession an impossibility.

e. The transcript of an interview with Marvin Fowler, who told police:

– that he knew Scott best "out of all his brothers";

– that "John-John" (John Davis) started to the park with Fowler and Chavez but changed his mind, turned back and told Fowler and Chavez, "You better not go up there, because [Davis] knew a lot of things going on up there, all kinds of weirdos";

– that "We know it was two guys";

– that Scott Fowler usually had money and that John Davis would know where he got it;

– that "Everybody said [Scott Fowler] came home at 11:30 that night" (a fact inconsistent with the facts as allegedly told by petitioner to the police);

– that someone named "Nick" (Nick Allikas, as apparent from the report)

referred to by the interviewer as "your friend upstairs," "doesn't know nothing about nothing";

– that "all of [Scott's] friends were trouble makers";

– that he "knows just about all of Scott's friends," but that "I don't think Scott knew anybody like that [i.e., gay]" (a fact known by the police at the time to be false).

f. A report of a second interview with Marvin Fowler in which:

– he said that he had been with Nick Allikas until approximately 9 p.m. on the night of the homicides, that they had picked up some "dirty books" in San Diego, that Allikas had said he was going to go bowling thereafter and that Allikas also said he was going to show the "dirty books" to someone at the Arena Bowl;

– he admitted that Marvin had had sexual relations with Allikas; he stated that at the time Nick left him off at home, "Nick gave him the feeling that Nick wanted to score";

– he stated, on being asked "if he felt that Nick had anything to do with this," that "he did not know, but, if Nick was arrested for the killing that he would testify against Nick";

– he stated that Scott and one Frank McCoy, "an out and out whore," would on occasion go to the Long Beach Pier "and pick up whoever they could in order to make some money";

– he replied, when asked why Nick Allikas would have been "so nervous that his hands were trembling" when he was interviewed by the police, that he felt "his brother Scott knew the assailant or assailants."

g. A report of an interview of John William Davis ("John John"), who knew Allikas and Scott Fowler and gave the police the impression that he was

"withholding much information."

h. Reports indicating that Nick Allikas, who, at the time of the Bell Gardens offenses, was on probation for a violation of PC § 288 (lewd acts with a person under 14):

– stated that Scott was "a hustler";

– had been "positively identified" by Bell Gardens Police Explorer Mary Merk as being with victim Ralph Chavez at a Taco Bell in Bell Gardens at 9:52 on the night of the homicides;

– admitted spending the day until approximately 9 p.m. with Marvin Fowler;

– said (unconfirmed by any other witness) that he went from there to Arena Bowl "for a few minutes" and then (also unconfirmed) to WonderBowl (where he claimed to have been until approximately midnight), but

– could not account for all of his time subsequently that night other than for being home alone. (Another report indicates that Allikas "has been arrested on approximately five occasions. The first occasion being in New Jersey, this being for sexual assault and the other arrest being in the County of L.A. He has crimes against children, rape, attempted rape.")

i. A report of an interview of Lou Pasquale, the owner of Arena Bowl, who said that a patron observed by the officer to be Nick Allikas was frequently there and "would play the pinball machines usually accompanied by ten or fifteen year old boys," but that he did not see him there on the evening of 7/25/76.

j. A report of interview of Billie Darlene Bailey, manager of the apartment complex in which Nick Allikas lived, who "assumed that Scott Fowler knew Nick, because everyone in the area knew Nick." She further stated that Nick used to frequent the billiard hall at Atlantic and Clara which Fowler also used to frequent, and believed that "Scott Fowler knew Nick."

k. A report of interview of Christine Ruth McNeil (DOB 8/27/59), in which she said:

– that at the beginning of July, 1976, an incident occurred in which neighbor Bobby Davis stabbed one Windel Ludlow (who, according to Christine, resembled the police composite) at the Fowler residence;

– that subsequently Donald Ludlow ("who lives at 4861 Clara St. in Cudahy [the address at which Nick Allikas was also living], wears a green fatigue-type Army jacket and rides seven different types of motorcycles and has a yellow dirt bike"), along with Windel and third brother Avon Ludlow, "have been coming around the Fowler's residence during the last month, trying to locate the person that stabbed the brother;

– that all three "are potentially violent."

l. A report identifying Thomas Potts as having described persons known from other sources as having been present at the scene, as looking like the police composite and not like petitioner.

m. A report identifying Kim Cain, an employee of Carl's Junior in Bell, California, as having seen the homicide victims at the restaurant at approximately 9 p.m., making the story in petitioner's alleged confession an impossibility and tending to corroborate Mary Merk's sighting of Allikas and one of the victims at another hamburger stand approximately an hour later.

n. Reports establishing that, despite petitioner having allegedly gone to the scene on his motorcycle and witnesses' consistent reports of one man on a motorcycle hanging out with the victims shortly before their death, the motorcycle actually seen was a different color from petitioner's and that its tracks, of which plaster casts were taken and "lost," could not have been made by petitioner's motorcycle.

o. A report of an interview of Frank McCoy, who identified numerous third parties (adult males) who had probably had homosexual relations with victim Scott Fowler and who said he thought Fowler would possibly "hit on another male" at the park where his body was found.

p. A report of an interview of Edward Alvarez, a suspect who knew victim Fowler and correctly and precisely described Fowler's knife wound, although the police maintained that only they and the killer had this information.

q. A report stating that Ralph Chavez's father (Ralph Ortega Chavez, Sr.) had recently taken out a $20,000 life insurance policy on Ralph and indicating that this information had been received from other sources than Mr. Chavez that he may have paid "Blackie" (probably Paul Anderson), a former mental patient who lived with Chavez's ex-wife, for the killing.

r. A report of an interview of Richard Donald Lathrop, who confirmed that Craig Crowder, who lived only two blocks from Jose Feliciano, "matches the description almost perfectly of the composite drawing" of one of the individuals seen at the scene with the 1976 victims on the night of the homicides.

s. A report of an interview of Linda Lois Wellman, who was living with Kent Alexander Beason (DOB 5/18/53); Beason was described as "crazy and hot tempered," and had been arrested in a citizens' arrest for trespass. Beason told Wellman that the arresting officers had mentioned that he resembled the Bell Gardens murder composite and that he had been held overnight for investigation. He then told her that the composite artist had done a lousy job of drawing his picture because he didn't look like the composite and that he had fooled the police and had gotten away with murder because they could not prove he committed the crime. He then told her he "cut their throats to

teach them a lesson" because they "went against me."

t. The report of an interview of a suspect named James Lee Crumwell, a/k/a James Lee Savage, who was wanted for unlawful flight, parole violation, the murder of a young boy in Arizona and a similar murder in Wisconsin, and who was said by an investigating officer to meet the physical description of one of the men seen at the scene. Crumwell, who is approximately the same age as petitioner has been arrested in relation to the 1979 murder of a 13-year-old boy in Costa Mesa and for 15 counts of child molestation.

u. An interview report of witness Jose Feliciano, who identified petitioner (for the first time at the second trial) as a man in an Army jacket whom he saw hanging out with the victims at the scene; in the report, Feliciano "positively identified" a photo of John Helder Arnett, Jr., as the man with the Army jacket.

v. Separate interviews of Jose Feliciano and Audie Cullison; each reported having reviewed 14 photographs and "positively identified" the photo of "Charles Michael Lohman" as having been with the victims at the scene on the night of the homicides.

w. A report of an interview of Lohman in the San Diego County Jail in which he said he "might have been" in Bell Gardens at the time of the Fowler and Chavez homicides.

x. A report of Lohman having remarked in the back of a police van, when it was not public knowledge that the police were investigating the sexual aspects of the Chavez/Fowler killings, "That murder has probably been reduced to child molest by now."

y. A report from an unidentified police informant known by an officer to be reliable, that "Gary" had told her, "And you know those two kids that got their

throats cut? Well, I killed them because they didn't give me what I wanted." Although to the best of counsel's knowledge there was no public information at the time concerning the sexual activities of Fowler or Chavez, the informant also said "Gary" referred to "one of the boys, if not both, as `cocksuckers.'"

z. A report stating that Raymond Lee Evans of Glendale, who wore a large knife strapped to his right side and matched police descriptions of the suspects, was photographed; his photograph, which was apparently used in photo line-ups, inexplicably disappeared from the police property room.

aa. A property report indicating that an address book was collected from the crime scene.

bb. A report of an interview of Carl Hamilton, Jr., who informed the police that he had been told by Charles ("Chuck") Vanoy that the latter had been in Ford Park on the date of the Chavez and Fowler homicides, had seen the offender and knew him to work at a specific motorcycle shop, which was pointed out to Hamilton by Vanoy. A related report states that one witness, while under hypnosis, identified the police composite of one of the suspects as "Chuck."

cc. A report indicating that Lt. Bower, one of the investigating officers in this case, was instructed to search the residence of Linda Gail Camp and Brenda Kay Anderson for "homicide evidence" regarding the present case, including "fishing tackle boxes, lunch pails, fishing gear, knives, cigarette lighters, etc." Counsel at the second trial (Larkin and Carney) never investigated the reasons why Camp and Anderson were investigated by the police.

dd. Reports that Deputy Figueroa had separately interviewed Jose Feliciano and Tracy Adkins at Ford Park on the evening of the homicides; that Feliciano reported having seen two suspects; one (who came to the site on a partly

yellow, recently hand-painted motorcycle with a rectangular taillight) resembled the photograph of Eddie Avon Ledlow and the other was wearing an army fatigue jacket, had a knife strapped to his right leg and was not on the motorcycle; and that Adkins had also seen a "square" red light at the pond.

ee. A report of an interview of Velma Wells, who reported that at the time of the homicides David Jenkins, a friend of her son who was recently released from the U.S. Army, had been living at her trailer in Bell Gardens;

– that Jenkins "slipped very quietly into the trailer" in the early morning hours after the homicides and crawled across the floor;

– that he slept until approximately noon;

– that when he got up she remarked to him she hoped the killers would be caught and that he had said "it will never happen, no way, it is only a one time thing";

– that Jenkins admitted being at the park "just ten minutes before the killings," although it was impossible for anyone who was not present at the killings to know that precisely when they occurred;

– that he left some of his clothes "covered with blood" in the hamper in the trailer;

– that she washed the clothes but never inquired of Jenkins how they had become bloody;

– that several days later Jenkins and Wells' daughter-in-law Brenda Myers left together and had not reappeared;

– and that Wells initially went to a motel, a fact confirmed by the police.

ff. A report of an interview with David Allen Jenkins (DOB 4/30/57 according to his statement, although military records obtained by the police showed DOB 2/18/57), who:

– admitted having been at the park;

– said he was there with Wells' son Clinton Myers;

– denied having known, except from a statement by Clinton, that they had been there just before the homicide;

– stated he thought Mrs. Wells was a truthful person;

– and gave the officers the impression that he "was very nervous, and appeared to be concealing something during the interview."

gg. A report of interviews of Richard Donal [sic] Lathrop and Craig R. Crowder; the police described Crowder to Lathrop as having "matched the description almost perfectly of the composite drawing . . . "

hh. A report of an interview of Sharon Coplan, who had previously lived with Beason, and who told the police he "was crazy and hot tempered" and "had mentioned killing several North Vietnamese when he was in the Army and that he enjoyed killing people."

ii. A report of the interview of Edward Fimbres Alvarez, who

– described to Calvin Dale Snyder the wound inflicted on one of the two victims;

– gave the police an explanation they perceived to be false of how he had obtained that information;

– was told by the interviewing officer that only the killer could have correctly described the wound;

– admitted he knew Scott Fowler;

– and gave an alibi that he admitted could not be confirmed by any third party.

jj. A report of an interview of Vicky Shidle, who stated that she saw Scott Fowler at 11:15 p.m. on 7/25/76 with a fishing pole near her residence at 4635 Clara, Bell Gardens, making the story in petitioner's alleged confession

an impossibility.

kk. A report of an interview of Mary Maxine Bushea (DOB 8/25/45), who was present at Ford Park with her son Scott in the evening, saw both the two suspects and the victims and noticed that the victims carried a gallon-size white plastic bottle, and other reports of the presence of persons (e.g., Scott Bushea and Jose Feliciano) who would have seen and known about the bottle. These facts are consistent with facts "confessed to" by petitioner that the prosecution asserted at trial could have been known only by the actual killer.

ll. A report of an interview of Jim Luna, one-time director of the Sugar Ray Foundation, who knew Fowler, admitted to having taken him fishing "three or four times," admitted to being bisexual, admitted to having had sexual relations with Fowler's brother Marvin and believed Marvin was "holding something back from the officers."

mm. A report of an interview with Ms. Lee Ugone, a counselor who had worked with both victims and identified the photo of a "suspect" who, she said, had entered the Fowler residence two days before the Fowler homicide. From other reports, counsel know this to have been the photograph of Nick Allikas. Ugone had spent two hours fishing with Fowler at Ford Park approximately two weeks prior to the homicide.

5. The approximately 400 pages of discovery were not disclosed to petitioner or his counsel until 1986, in connection with petitioner's retrial.

6. Peter Williams, petitioner's counsel at the first trial, never saw the documents until he was called as a witness at a pretrial hearing during the second trial in 1986. The materials turned over to petitioner for the first time in 1986 included descriptions and identifications of suspects other than petitioner, confessions/admissions by another suspect, activities of the victims, statements of witnesses, the names and

addresses of such witnesses, reports regarding physical evidence and other pertinent material. Exhibit S-A, Bell Gardens Police Reports re Counts I and II.

7. Additional material evidence that was covered by the 1979 and 1986 discovery orders was intentionally lost or destroyed by government agencies and was not available to petitioner at the second trial. This physical evidence consisted of a series of photo line-ups that had been shown to Jose Feliciano, an eyewitness to people seen with the victims just prior to the Bell Gardens incident. Feliciano and other witnesses had examined several photo line-ups close to the time of the incident and identified suspects other than petitioner.

8. Further, a photograph of a suspect other than petitioner, which closely matched the composite drawing, was covered by the 1979 discovery order (reports also indicate that this suspect was identified by more than one of the witnesses). While not disclosed to the defense at the time of the first trial, this photograph was brought to the courtroom for inspection shortly before the second trial and was then lost or destroyed by government agencies before the defense could use it at trial, as intended.

9. Also, in the course of the investigation of the Bell Gardens killings in 1976, police approached Ronald Medrano, showed him a photograph of petitioner and asked numerous questions regarding petitioner's activities. Petitioner has never been provided with discovery of any reports regarding this 1976 investigation.

10. By the time the material was released in 1986, ten years after the killings and investigation, it was impossible to locate the witnesses and present their testimony at trial. Timely discovery and adequate trial representation (cf. Claim 86) would have allowed petitioner to present substantial evidence of his innocence on Counts I and II. See Exhibits G and H.

11. Absent the government's intentional refusal to comply with the 1979 discovery order and the ensuing loss of evidence, the result of the proceedings would have

been more favorable to petitioner on both the questions of guilt and penalty.

12. The government's various acts of misconduct, including but not limited to the suppression, destruction, belated disclosure, and continued withholding of evidence, including material exculpatory evidence, deprived petitioner of due process and a fundamentally fair and reliable guilt and penalty trial.

CLAIM 20: The Prosecution Violated Petitioner's Rights by Withholding *Brady* Evidence Regarding Benefits Paid to Jailhouse Snitches who Testified at Pretrial Hearing.

1. Petitioner's conviction and sentence of death were rendered in violation of his constitutional rights to a fundamentally fair and reliable determination of guilt and penalty, to the effective assistance of counsel, to a trial free from false evidence and to the disclosure of all exculpatory evidence, including evidence tending to impeach the prosecution's witnesses and refute the prosecution's case, under the Fifth, Sixth, Eighth and Fourteenth Amendments and the analogous provisions of the California Constitution, by the conduct of the Los Angeles County District Attorney's Office and the Los Angeles County Sheriff's Department who intentionally withheld exculpatory evidence regarding benefits provided to jailhouse informants who testified against petitioner at a pretrial hearing.

2. In compensation for Mr. White's December 4, 1986 interview with Deputy District Attorney Millett, Mr. Millett filed a writ petition, previously prepared by White, on White's behalf, immediately after the interview. The petition was presented to Judge Armstrong.

3. In compensation for White's testimony at the December 23, 1986 hearing on the admissibility of jailhouse informant testimony, White was transferred from the main Los Angeles County Jail to the Glendale City Jail. At the Glendale City Jail, White was afforded more privileges than at the main Los Angeles County Jail, including access to a direct-dial phone and the ability to receive property, including jail contraband, from his wife.

4. On December 29, 1986, Mr. White wrote a letter to Assistant District Attorney Livesay in which White described his cooperation with the District Attorney's Office in numerous cases, including petitioner's. In response to that letter and in further compensation for White's cooperation, Mr. Livesay arranged for Judge Haber to order White's release from the Glendale City Jail, despite a pending parole hold which would normally bar any release. On December 29, 1986, Deputy District Attorney Andrew Diamond personally drove White from court to White's residence. On December 31, 1986, Mr. Diamond telephoned White and informed him that the parole board had learned of his release and that he would have to turn himself in to the Glendale Police Department, which White did later that evening.

5. On January 2, 1987, Mr. Livesay telephoned White and told him to call Diamond and tell Diamond that Livesay had ordered him to obtain White's release. Diamond arranged for Judge Perez to order White's release, despite the pending parole hold. Officer Gardner of the South Gate Police Department transported White from the Glendale City Jail to Van Nuys Superior Court and, following White's release, to White's residence. Officer Gardner advised White that Millett had requested the South Gate Police Department to provide White with such transportation. On January 6, 1987, White attended a parole board hearing and was taken into custody. Exhibit S-E, Declaration of Leslie Vernon White.

6. Informant Anthony Cornejo had also repeatedly received benefits from the District Attorney for testimony over a period of nearly 10 years in other cases, e.g., in the form of letters recommending lenient sentencing, early parole and transfer to a prison near his family (e.g., Exhibits C and D). In the Ash case in 1980, he and another inmate, Schenley, testified (almost exactly as in the present case) to having been transported to court with the defendant, who allegedly gave inculpatory statements on the bus. Cornejo then recanted and told the DA that he and Schenley had partially concocted the story in that

Schenley had not been able to hear the statements. Exhibit F. In an investigation of Schenley's possible perjury, however, Cornejo (then incarcerated) told investigators that he would not assist in a prosecution for perjury unless "someone would paint [him] a brighter picture" regarding his future. Exhibit S-F. Cornejo was charged with aiding and abetting Schenley in perjury despite his admissions.

7. The prosecution also knew that Cornejo had admitted to an attorney for Lawrence Bittaker that a "script" had been developed by several regular informants, including himself, for false testimony in that case. Exhibit B.

8. The benefits conferred on White and other jailhouse informants in compensation for their assistance in the prosecution of petitioner constitute substantial, material and exculpatory evidence. Such benefits and compensation were never disclosed to petitioner or his counsel.

9. The information withheld by the District Attorney's Office and the Sheriff's Department regarding compensation of jailhouse informants would have impeached the testimony of Cornejo and other law enforcement witnesses.

10. The failure to disclose such benefits prejudicially and unfairly influenced and effectively limited petitioner's tactical decisions regarding whether to testify in his defense and whether to attack the voluntariness of the confession at trial. Disclosure of such evidence would have produced a result more favorable to petitioner in the guilt and penalty phases.

11. As the Supreme Court recently held in *Banks v. Dretke*, 540 U.S. ___, 124 S.Ct. 1256, 1273, 1275 (2004), *Brady* is violated when the prosecution fails to disclose material exculpatory evidence regarding a informant witness presented at trial:

> On the question of "cause," moreover, Banks's case is stronger than was the petitioner's in Strickler in a notable respect. As a prosecution witness in the guilt and penalty phases of Banks's trial, Farr repeatedly misrepresented his dealings with police; each time Farr responded untruthfully, the prosecution allowed his testimony to stand uncorrected. See at 4-7. Farr denied taking money from or being promised

> anything by police officers, App. 37; he twice denied speaking with police officers, id., at 38, and twice denied informing Deputy Sheriff Huff about Banks's trip to Dallas, *id.*, at 109. It has long been established that the prosecution's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972) (*quoting Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam)). If it was reasonable for Banks to rely on the prosecution's full disclosure representation, it was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction. *See Berger v. United States*, 295 U.S. 78, 88 (1935); *Strickler*, 527 U.S., at 284. n14
>
> . . .
>
> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," Tr. of Oral Arg. 35, so long as the "potential existence" of a prosecutorial misconduct claim might have been detected, *id.*, at 36. **A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.** "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (*quoting United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)). We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S., at 281; *accord*, *Kyles*, 514 U.S., at 439-440; *United States v. Bagley*, 473 U.S. 667, 675, n. 6 (1985); *Berger*, 295 U.S., at 88. *See also Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting). Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly resting upon the prosecuting attorney, will be faithfully observed." Berger, 295 U.S., at 88. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. *See Kyles*, 514 U.S., at 440 ("The prudence of the careful prosecutor should not . . . be discouraged.").

Banks v. Dretke, 540 U.S. ___, 124 S.Ct. 1256, 1273, 1275(2004) (Emphasis added).

12. See also Exhibits S-A, S-C, S-D, S-E, I and J.

13. The government's suppression of material exculpatory evidence of benefits provided to informants deprived petitioner of due process, a fundamentally fair and reliable guilt and penalty trial in violation of *Brady*. *Banks*, 540 U.S. ___, 124 S.Ct. at 1279.

CLAIM 21: The Prosecution Violated Petitioner's Rights by Failing to Disclose Exculpatory Evidence in Discovery Regarding the Prior Felony Convictions and Probationary Status of Prosecution Witness Scott Bushea.

1. Scott Bushea was called by the prosecution to testify regarding the 1976 Bell Gardens killings charged in Counts I and II. Bushea testified that on July 25, 1976, at about 5:00 p.m. he went to Ford Park with his mother and his friend Jose Feliciano. Bushea met

Fowler and Chavez, though he had not known them before. When Bushea left the park at 11:30 p.m. or midnight, he noticed that Fowler and Chavez were still there fishing and were standing around with two men; Bushea described the men as being adults in their mid to late twenties. One wore an Army field jacket. One of the men had wavy, almost shoulder-length hair, while the other had longer hair, a moustache and beard. The two men had a yellow dirt bike.

2. On October 12, 1984, Scott Bushea was charged by complaint in the Los Angeles County Municipal Court with two felony violations of Penal Code § 288(a). Los Angeles County Municipal Court, Long Beach Judicial District, Case No. A-026 633. On October 23, 1984, in a closed proceeding, Bushea entered pleas of guilty to both charges. On January 31, 1985, Bushea appeared before the Hon. Sheila F. Pokras, Judge of the Superior Court, for sentencing. The court suspended the imposition of sentence, granted probation for three years and ordered Bushea to serve 114 days in the county jail. Bushea was on probation at the time of the second trial. Exhibit S-F, Copy of Reporter's Transcript in *People v. Bushea*, Los Angeles County Municipal Court, Long Beach Judicial District, Case No. A029633.

3. The charges against Bushea result from a three- or four- year-long pattern of sexual abuse, including forcible oral copulation, intercourse and sodomy of a child. The victim was approximately five years old when Bushea began his sexual assaults.

4. Although Bushea was on probation and had been convicted of two felony counts of violation of Penal Code section 288, as described above, petitioner and his counsel were not informed of Bushea's felony conviction or his probationary status at any time during petitioner's own proceedings.

5. The prosecution's failure to disclose relevant information included, but was not limited to, the fact that Bushea had been the victim of at least one male adult sexual predator prior to and at the time of the 1976 homicides and that his victimization left him

emotionally and psychiatrically impaired.

6. The failure to disclose substantial material exculpatory evidence affecting Bushea's credibility prejudicially deprived petitioner of a fundamentally fair and reliable guilt and penalty determination.

7. Petitioner was not placed on notice of the possibility that Bushea might receive some benefit for his testimony.

8. Furthermore, the failure to disclose Bushea's conviction also deprived petitioner of the opportunity to argue the possible involvement of the same person who molested Bushea and/or his associates in the Bell Gardens killings and to attack the identification testimony of Bushea's friend Jose Feliciano, based on Feliciano's possible knowledge of that person's involvement.

9. Had petitioner been aware of the above factors impeaching Bushea's credibility, the result at the guilt and penalty phase would have been more favorable to petitioner.

10. The failure to disclose Bushea's convictions and probationary status deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

D. CLAIMS RELATING TO TRIAL COURT ERRORS.

1. PRETRIAL.

CLAIM 22: Petitioner's Rights were Violated by Assignment of a Commissioner, Rather Than a Judge, to Preside Over His Case.

1. Petitioner was tried before a Los Angeles County commissioner rather than a superior court judge. RT A-294. The commissioner, John A. Torribio, was not permitted, either by statute or by the California or federal constitution, or by training and experience, to try any felony, let alone a capital case.

2. Although Mr. Reno apparently signed a written stipulation to have the commissioner hear his case, petitioner did not knowingly and intelligently waive his right

to trial before a superior court judge. The ramifications of such a decision were not fully explained to him.

3. Any purported waiver was not knowing and intelligent for reasons including but not limited to (a) the lack of adequate communication and advice from his attorney at the time, and (b) his inability, as a result of mental incompetence, to make a knowing and intelligent waiver.

4. As a result of the above, petitioner was denied a fundamentally fair trial and a fair and reliable determination of guilt and penalty.

CLAIM 23: Petitioner's Conviction and Sentence Must be Reversed Because of the Commissioner's Bias.

1. It was bad enough that an inexperienced commissioner sat as the judge on the case, but on numerous occasions, the commissioner improperly demonstrated outright hostility and bias toward petitioner. This bias alone was sufficient to render petitioner's trial presumptively unfair.

2. In addition, however, the court employed its bias against petitioner as a basis for denying petitioner other constitutional rights.

3. First, at an in-chambers conference, outside of petitioner's presence, the commissioner and the parties reviewed various photos, magazines and books which had been seized from petitioner's apartment. The materials depicted males in various states of dress. While going over the materials, the commissioner stated: "**Jesus, why can't they be girls? Jesus.**" (RT 2439; emphasis added.) The commissioner then said:

> Are you taking this down as we're talking? You didn't put that why can't they be girls, did you?
>
> The record should reflect we're in chambers. Mr. Memro's not present. It's just the three attorneys.
>
> Mr. Millett has brought in all of the photographic material that was referred to by Deputy Carter plus nine magazines and one book which are all homosexual material involving, it appears, men only.

(RT 2439).

4. The commissioner's remark asking why couldn't the subjects be "girls" was wholly inappropriate. It implied that the materials would have been acceptable had they been nude pictures of "girls." This comment demonstrated a bias against petitioner for his sexual orientation.

5. The commissioner attempted to cover up his remark when he tried to have the court reporter not make his comment part of the record. This was done despite the legal requirement that all proceedings in a capital case be transcribed on the record.

6. The commissioner's personal offense at the gender of the subject in the materials was evidenced when he ruled that they could be admitted before the jury. He stated:

> I think the record should be clear that these are magazines and photographs [that] have young boys. That's the basis of my ruling.

(RT 2457). This remark, taken in conjunction with the commissioner's revulsion at seeing the materials and exclaiming "why couldn't they be girls" instead, demonstrates that the commissioner was biased against the homosexual nature of the evidence. The basis of the commissioner's ruling was its own prejudice as the materials themselves were inadmissible.

7. Second, at a subsequent sidebar conference, the commissioner again emphasized its revulsion at the photographs:

> These photographs are of young boys seven through about 18. In some of them the boys are nude with their penises erect...[¶¶] You know, these are not photographs of grown men. These are not photographs of women. These are photographs of young boys. And I mean young. I don't mean 20, 21, 22; I mean, these are kids under anybody's definition.

(RT 2459).

8. First, on May 15, 1987, the jury sent a note to the court regarding Penal Code § 288. (RT 2872). During the discussions of the appropriate response, petitioner

sought to communicate with his attorney. The commissioner lashed out:

> Mr. Memro, could you please be quiet? You're talking constantly. Your attorney [can't] listen to me. He can't think. So why don't you just let your attorney be the lawyer?

(RT 2875).

9. Petitioner responded, "Because it involves me also." The commissioner launched into an insulting, degrading diatribe:

> **I understand that, Mr. Memro, but your legal I.Q. is zero. You have proved that to this Court beyond a shadow of a doubt. You spent 12 years studying and you – still you don't have any more concept of what's going on in those 12 years. You're an intelligent man, but the intelligence you bring to this trial is frightening.**

(RT 2875; emphasis added).

10. This personal and unprofessional attack on a litigant violated Mr. Reno's constitutional rights. It was intemperate, improper and inappropriate. It also violated the California Code of Judicial Ethics. See Canon 3, 6.

11. The commissioner also improperly interfered with the attorney-client relationship. Here, petitioner sought to confer with his counsel about the legal issues surrounding the jury's question. Such open communication lies at the heart of a meaningful attorney-client relationship. If the court felt that counsel could not address both the court's questions and petitioner's concerns, the proper step would have been to take a brief recess so that petitioner could confer with his counsel. Doing so would then allow trial counsel to come back to the court, address the court's concerns as well as act as petitioner's representative in resolving the issues. To shout petitioner down and cow him into silence violated petitioner's rights to counsel and harmed the attendant attorney-client relationship.

12. This personal attack demonstrates the contempt with which petitioner was regarded by the commissioner. Even if petitioner had a zero "legal IQ" as the commissioner exclaimed, to throw insults at petitioner in open court was prejudicial. The court is required to decide the legal principles before it without prejudice and to treat the

parties with respect. Any observer hearing this remark could only conclude that the commissioner acted improperly and with bias against Mr. Reno. The commissioner's undisguised disgust with petitioner colored his treatment of petitioner throughout the trial. During the penalty phase, the commissioner was hesitant to allow petitioner to testify as he desired. Petitioner was notably upset that the commissioner appeared to be ruling that he could not testify and objected. The commissioner responded:

> Mr. Memro, I realize to you we are all your enemies. That's fine. Your own paranoia is something you'll have to deal with ...

(RT 2963).

13. The commissioner's acknowledgment that petitioner was paranoid and that his paranoia affected his ability to make decisions about legal strategy should have triggered a competency determination. Having expressed a doubt about petitioner's ability to participate or understand the nature of the proceedings competently, the commissioner was obligated to initiate proceedings pursuant to Penal Code §1368. "Under the statutory scheme mental competency proceedings involve two distinct steps: (1) initiation of the §1368 proceedings and suspension of the criminal trial; and (2) actual trial of the competency issue." *People v. Mayes*, 202 Cal.App.3d 908, 915 (1988). This was a mandatory proceeding:

> [W]hen a "doubt" arises in the mind of the trial judge regarding defendant's present sanity or competence to stand trial, it becomes his duty to certify the defendant for a sanity hearing; *the matter is jurisdictional and cannot be waived by defendant or his counsel.*

In Re Davis, 8 Cal.3d 798, 808 (1973), citing, *inter alia, Robinson v. Pate,* 383 U.S. at 384. As explained by the Supreme Court, this is so in part because "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Robinson v. Pate,* 383 U.S. at 384.

14. The failure to hold a competency hearing following the expression of doubt

as to defendant's competency is error and cannot be cured by a retrospective appellate determination of probable competence to stand trial. Any

> . . . *sub silentio* disposition of the section 1368 proceedings without a full competency hearing rendered the subsequent trial proceedings void because the court had been divested of jurisdiction to proceed pending express determination of the competency issue.

People v. Hale, 44 Cal.3d 531, 538-539, 541 (1988). Reversal for this error is automatic. *Robinson v. Pate,* 383 U.S. at 387.

15. If, however, the commissioner was only throwing out the word "paranoid" as an insult and did not believe it, despite the court's conclusion that petitioner was suicidal (*see, e.g.,* RT 2964, 2967), then the court's offensive behavior was further evidence of the commissioner's bias against petitioner. If the commissioner did not believe that petitioner was mentally ill, there was no reason to hurl yet another insult at petitioner.

16. The court's continued hostility to petitioner was demonstrated only a moment later. After repeatedly stating that the court would not allow his testimony because it would amount to "participating in judicial suicide" and would be "very offensive" (RT 2967) and so ruling, (RT 2963) , the prosecutor suggested that they might break for the day to consider it overnight. The commissioner reacted and abruptly changed its position. The commissioner stated:

> We're going to finish today, counsel. We're going to finish today. This case has – there's no reason not to finish today.
>
> So Mr. Memro, you will be allowed to make any statement to the jury you wish to make.

(RT 2965).

17. The court gave no explanation for its abrupt and complete reversal of its position that petitioner could not testify, other than he wanted it to finish that day. Truly, the commissioner was more concerned with a fast track resolution than with a just resolution of the case. His contempt for petitioner caused him to make what he considered

to be the wrong ruling, just to get the trial completed. Doing so was further evidence of the commissioner's bias and impropriety. If the trial court's personal animosity against petitioner was so strong, he should have recused himself from hearing the case.

18. Moreover, the commissioner lacked the trial experience which sitting Superior Court Judges have gained by handling numerous trials. This inexperience may have been part of the reason why the court was (1) biased against petitioner, and (2) affected by its bias in ruling on the issues presented. Moreover, the fact that commissioners do not normally hear trials may have led the commissioner to remain on the case despite his growing bias and prejudice, whereas a Superior Court Judge with more trial experience would have been more willing to recuse himself.

19. A biased trial judge is structural error. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 535 (1972). The Due Process Clause requires a "fair trial in a fair tribunal," (*Withrow v. Larkin*, 421 U.S. 35, 46 (1975)), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. *Bracy v. Gramley*, 520 U.S. 889, 904 (1997). It is not subject to harmless error analysis. *See generally Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991).

CLAIM 24: The Trial Court Violated Petitioner's Right to a Speedy Trial and Due Process.

1. Petitioner moved the trial court to dismiss his case based on the speedy trial violation. Moreover, petitioner went even further and moved the court to appoint another attorney to represent him in a pretrial review of the motions to remove appointed counsel and to dismiss the case. The erroneous refusal of the court to grant either motion effectively prevented petitioner from seeking such relief before his trial and effectively left petitioner unrepresented by counsel at this critical stage of the proceedings in violation of his Sixth Amendment right to counsel.

2. The violation of a defendant's California statutory speedy trial rights does not

require a showing of prejudice when the matter is raised prior to trial, as it was here. Thus, the action of trial counsel and the trial court not only deprived petitioner of the right to have his matter reviewed on a standard where no actual prejudice is required for reversal, but also resulted in extreme prejudice and irreparable harm to petitioner.

3. Additionally, the failure to dismiss the case (without prejudice) due to a violation of petitioner's speedy trial rights, as required by California law, severely prejudiced petitioner's defense. Had petitioner been brought to trial within the statutory period, the perjurious testimony of the jailhouse informants would not have surfaced and been used against him during the motion to suppress his confession. This false testimony was extremely damaging as it not only undercut petitioner's version of the confession and supported that of the police, but it also effectively prevented petitioner from raising the validity of his alleged confession before the jury.

4. As the prosecution conceded throughout the trial court proceedings, there was no case against petitioner without the admission of his "confession."

5. Additionally, after the running of the 60-day period, the prosecution (a) suddenly "found" additional *Brady* and discovery materials relating to the 1976 murders which required even further delays in the proceedings and (b) "lost" evidence favorable to the defense. In particular, as set forth above, petitioner lost the ability to locate favorable witnesses to the 1976 offenses. Thus, prejudice from the delay is affirmatively shown and the habeas petition must be granted on the speedy trial violation.

6. The refusal to comply with the state statutory speedy trial rules, which requires mandatory dismissal, also served in this case to effectively deny petitioner any opportunity for a de novo hearing on his motion to suppress evidence and violated his right to due process under the Fourteenth Amendment to the Constitution. *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

7. The denial of these rights deprived petitioner of a state-created liberty

interest in violation of due process.

CLAIM 25: Petitioner was Deprived of a Full and Fair Hearing on the Motion to Suppress Evidence.

1. Mr. Reno was deprived of a full and fair hearing on the motion to suppress evidence because Judge William McGinley was prejudiced against petitioner and trial counsel was ineffective for his failure to recuse Judge McGinley from hearing the motion to suppress.

a. Prior to the first trial, the court held a hearing on the motion to suppress evidence. This hearing was held before Judge McGinley. At the conclusion of that hearing, the court denied the motion to suppress evidence.

b. In 1974-75, petitioner had appeared before Judge McGinley on an assault charge in Los Angeles Superior Court. Case No. A28968.

c. Prior to petitioner's release on probation on that case, Judge McGinley threatened petitioner, including but not limited to saying that he would "throw the book" at petitioner if he ever appeared before Judge McGinley again for any reason.

d. Petitioner informed counsel at both the first and second trials in this matter of Judge McGinley's stated prejudice against the petitioner. Neither trial counsel investigated this allegation or challenged Judge McGinley's fitness to preside over any of petitioner's proceedings.

e. At the commencement of the hearing on petitioner's 1538.5 motion, defense counsel Peter Williams made a motion to exclude witnesses. That motion was improperly denied by Judge McGinley as a result of his bias against Mr. Reno. As a result, each of the officers was permitted to hear the testimony of the other officers.

f. Because of Judge McGinley's prejudice against petitioner, the judge was not

objective, was biased and had the appearance of bias in his ruling on the motion to suppress evidence.

g. The commissioner in the second trial proceedings denied petitioner's motion to relitigate the motion to suppress evidence, thereby permitting the admission of the confession and physical evidence obtained as a result of the unlawful arrest of petitioner and warrantless search of his residence.

h. There would have been no conviction in the guilt phase of this case had the motion to suppress been granted. The prosecution could not have used the alleged confession of petitioner nor any of the physical evidence obtained as a direct result of the illegal arrest of petitioner.

i. Neither trial counsel had any reasonable, tactical basis for permitting petitioner's suppression motion to be litigated before a biased tribunal.

j. The failure to recuse Judge McGinley deprived petitioner of a fundamentally fair and reliable hearing on his suppression motion and guilt and penalty trials because the evidence was impermissibly admitted.

2. The prosecution failed to provide the location of a critical witness related to the motion to suppress evidence.

a. Prior to the motion to suppress evidence and the commencement of the second trial, petitioner's trial counsel attempted to locate and interview Joan Julian, the "psychic" who assisted the police in drawing a composite of the suspect based on her psychic "vision" of a man she "saw" with Carter. The government used a composite drawing based on this psychic's "vision" in the apprehension and arrest of petitioner. The drawing was used to identify petitioner.

b. At the hearing on the motion to suppress, the officers falsely testified that they did not rely on information provided by this psychic or the composite

drawing in their arrest of petitioner. Based on the false testimony of the officers, the court erroneously ruled that the police had not relied upon the assistance provided by this psychic.

c. Petitioner was never provided with the address of Joan Julian. Petitioner was thereby deprived of the opportunity to investigate what information was provided to Joan Julian and what statements were made to Ms. Julian by the police regarding their reliance on her psychic "vision."

d. Contrary to this testimony, Ms. Julian would have testified that the police did in fact rely on her assistance and credited her with a significant role in the petitioner's apprehension. Exhibit S-G, James Crenshaw, "Court Admits Psychic Evidence," *Fate Magazine* (November 1979).

e. The trial court would have granted the motion to suppress evidence had it considered the testimony of Ms. Julian regarding her role in the arrest of petitioner and the reliance by the police on her assistance prior to petitioner's arrest. Suppression of the fruits of the unlawful arrest would have led to a more favorable result at the guilt phase of the trial.

f. The intentional failure of the government to provide defense counsel with information reasonably necessary to locate and interview Ms. Julian constituted a denial of due process and deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

CLAIM 26: Petitioner was Deprived of a Fair and Accurate Suppression Motion Hearing at the First Trial.

1. Petitioner was deprived of a fair and accurate motion to suppress hearing at the first trial as a result of the police misstatement of information in the missing-juvenile report and the destruction and unavailability of police dispatch tapes.

2. With regards to the police misstatement of information in the missing-

juvenile report:

a. The legality of petitioner's arrest was raised at pretrial proceedings prior to the first trial. The motion to suppress was litigated at that time, denied and raised on appeal in *Memro I* and the related habeas petition. This Court did not reach the suppression issue in either the appeal or habeas proceedings.

b. Counsel at the second trial was erroneously prevented from relitigating the suppression issue, despite ineffective assistance of counsel at the motion to suppress and the existence of new relevant facts obtained from previously withheld discovery and *Brady* material.

c. The South Gate Police Department Missing Juvenile Report on Carl Carter, Jr., was prepared on October 22, 1978. The Report indicates that Carter was last seen by his brother near the rear of his residence at 7:00 p.m. (1900 hours), a full hour after Mr. Reno saw him, on that date. (Exhibit S-H, Missing-juvenile report).

d. Officer Sims arrested petitioner on October 27, 1978. In determining probable cause for the arrest, Officer Sims relied heavily on his purported belief that petitioner was the last person to have seen the boy prior to his disappearance. This alleged belief was based on two purported facts: first, that Carter was claimed to be missing at 6:00 p.m. and, second, that petitioner admitted being present at the Carter residence at that time. Moreover, the court, in finding probable cause for the arrest, considered it significant that according to police testimony, petitioner was the last person with Carter, prior to his disappearance.

e. The missing-juvenile report directly contradicts the crucial factors upon which the arresting officer and the court based the probable cause determination. Furthermore, the report corroborates the statement police

attribute to petitioner that he didn't do anything to Carter, and that the last time petitioner saw him he was safely walking toward his home from a nearby donut shop shortly after 6:00 p.m. This document is critical because it refutes the statement by Officer Sims that he allegedly believed petitioner was the last person to see the boy prior to his disappearance. This purported "belief" by the officer was a critical, if not the sole, basis for his immediate warrantless arrest of petitioner.

f. A reasonably diligent advocate would have used the missing-juvenile report to challenge the truthfulness of the arresting officer and the legality of the arrest. However, trial counsel did not use the missing-juvenile report to cross-examine Officer Sims or otherwise make reference to the Report. Mr. Williams admitted that he had no tactical reason for not making reference to that report. Mr. Williams candidly states that if he were engaged in the same suppression hearing today, he would "use the report to impeach the testimony of arresting officers Sims and Gluhak and also argue to the court that the report served to substantiate the lack of probable cause for defendant's arrest." Exhibit S-I Declaration of Peter M. Williams.

g. Defense counsel's failure to use the missing-juvenile report deprived petitioner of a legitimate opportunity to prevail at the motion hearing. Proper use of the report would have left the court no choice but to find the arrest illegal. Because the confession is a fruit of the arrest, proper use of the report would have caused the confession to be suppressed. If Mr. Williams had used the missing-juvenile report, there would have been a result more favorable to petitioner at the guilt and penalty phases.

3. With regards to the destruction and unavailability of police dispatch tapes:

a. Officers Sims and Gluhak were in radio contact with the South Gate Police

Department on the day and time petitioner was arrested. The radio communications were preserved on a dispatch tape that could have been obtained by defense counsel Williams and which was at least arguably covered by the continuing 1979 discovery order.

b. The dispatch tape provides significant evidence that could have been used to impeach the testimony of the arresting officers and corroborate petitioner's testimony. A reasonably diligent advocate would have obtained and preserved the dispatch tape reflecting communications of Officers Sims and Gluhak on the day of petitioner's arrest.

c. There was no tactical reason for not obtaining the dispatch tapes.

d. Defense counsel's failure to obtain the dispatch tapes deprived petitioner of a legitimate opportunity to prevail. Obtaining the dispatch tape and using that tape to impeach the testimony of Officers Sims and Gluhak and to corroborate petitioner's testimony would have caused the court to find the arrest illegal and would have produced a more favorable result to petitioner in the guilt and penalty determination.

e. The lack of this impeachment evidence, the failure of the trial court to consider it, and the resultant erroneous denial of petitioner's suppression motion deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

CLAIM 27: The Trial Court Erred in Failing to Exclude Witnesses During the Hearing on the Motion to Suppress Evidence.

1. At the first trial in 1978, trial counsel Williams made a motion to have all witnesses excluded, as "it is incumbent upon fairness that each witness testify without the 'benefit' of having listened to the other witnesses' testimony." (RT 38). Trial counsel also asked that the witnesses be ordered not to discuss any testimony with potential witnesses

until the hearing concluded.

2. The witness who was about to testify was Detective Sims from the South Gate Police Department. Three other South Gate Police Department witnesses were present: Officers Carter, Green and Gluhak. The judge reminded counsel that the determination is discretionary and asked if the prosecution wished to be heard. The prosecutor responded, "Yes. I would oppose it because it is discretionary with the court." (RT 38).

3. Trial counsel asked the court to explain:

> if there is any reason why the court should not grant my request to exclude witnesses . . . and I haven't heard counsel say anything except that he objects to it, with no reasons given for his objection to my motion to exclude . . . I think it would be an abuse of discretion for the Court not to grant my motion to exclude the witness.

4. The defense theory was that the officers lacked probable cause for petitioner's arrest and that all other evidence flowed from that arrest. The defense contention was that the officers coerced petitioner into providing a false confession that they spoon fed to him. The officers were given an opportunity to prepare their testimony and ensure consistency among them by hearing one another testify during direct and cross-examination.

5. "The practice of excluding witnesses from the courtroom except while each is testifying is to be strongly recommended, particularly where the testimony of the witnesses is in any measure cumulative or corroborative." *Williamson v. United States*, 310 F.2d 192 (9th Cir. 1962). "Such witnesses may, and often do, shape their testimony to match that given by other witnesses within their hearing. To prevent such matching of testimony is the prime purpose of putting witnesses under the rule." *Charles v. United States*, 215 F.2d 825 (9th Cir. 1954) (Judge refuses to exclude witnesses because he disagreed with rule of exclusion found to be abuse of discretion.); *see also Witt v. United States*, 196 F.2d 285 (9th Cir. 1952). "The exclusion of witnesses is obviously desirable

for such effect as it may have to prevent the perjurious parroting of testimony." *United States v. Postma*, 242 F.2d 488 (1957).

6. Having provided no reason for denying the request, even after a reason was specifically requested, the trial court's refusal to exclude the witnesses was an abuse of discretion and a violation of due process.

7. Here, the witnesses were officers from the same department who were testifying to corroborate each other's assertion of the voluntariness and content of the alleged, unmemorialized confession. They were also testifying as to the probable cause to arrest and alleged permission to search petitioner's residence. Allowing them to listen to each others testimony poisoned the proceedings and deprived petitioner of a fair trial.

8. The issues of petitioner's arrest, the search of his residence and the alleged subsequent confession were critical. All of the evidence against petitioner flowed from this illegal chain of events. If petitioner's arrest lacked probable cause, or if his confession was involuntary, the prosecution would have lacked sufficient evidence to proceed, as the prosecutor admitted. The failure to exclude witnesses thus unfairly skewed the testimony against petitioner and resulted in an unfair trial.

9. Because the trial court in the second trial did not allow petitioner to relitigate this issue, the record is based entirely on the hearing held at the first trial.

10. By refusing to exclude the witnesses, the court allowed each of the officers to hear the testimony of the others. The only witness to contest the police version of the arrest was petitioner. There was no contemporaneous memorialization of the confession.

11. By permitting all of the officers to remain in the courtroom and listen to the other officers' testimony, the court irreparably prejudiced petitioner's opportunity to cross-examine the officers effectively and to prove the invalidity of his arrest and thereby violated petitioner's right to due process, to confrontation and to a reliable determination of guilt and penalty.

CLAIM 28: The Trial Court Erred in Failing to Dismiss the Information Based Upon the Unlawful Seizure of Petitioner's Privileged and Confidential Legal Materials.

1. At the conclusion of the first trial, the trial judge issued an unlawful order that the Sheriff's Office in the Los Angeles County Jail confiscate petitioner's transcripts of the proceedings. (CT I 264). The prosecution conceded that pursuant to that order the records were taken from petitioner. (RT 302).

2. The papers included trial transcripts with defense counsel's and petitioner's notations and 14 pages of petitioner's handwritten notes specifically written at the request of trial counsel. (RT 386).

3. In addition, petitioner's entire confidential legal file was illegally taken by jail officials and illegally retained for several days in February 1982 over his objection. The file had been examined by agents of the state. (RT 388).

4. The Supreme Court has held that the sanction of dismissal for a breach of a Sixth Amendment right to counsel is appropriate whenever there is prejudice to the defendant or a substantial threat thereof.

5. Petitioner was prejudiced and there was a substantial threat thereof as a result of the following:

a. Petitioner and counsel at the second trial were deprived of materials he and his attorneys had prepared during the first trial.

b. The government had access to these materials for its own use prior to, and during, the second trial.

c. Because the notes pertained to a central issue in the case, possession of the materials by the prosecution and the officers who would eventually testify against petitioner greatly enhanced their ability to shape their testimony accordingly and rebut petitioner's testimony at the suppression hearing.

d. Possession of these materials by the trial court influenced the court's rulings

both at pretrial hearings and at trial.

6. Accordingly, his conviction and sentence must be reversed for this violation of petitioner's Fifth and Sixth Amendment rights.

CLAIM 29: The Trial Court Erred in Failing to Suppress the Jailhouse Informant's Testimony.

1. After petitioner was returned to county jail following reversal of his convictions by this Court, he was concerned about his jail housing. Several times before the retrial he requested the trial court to order the jailers to house him in a safe unit. The trial court held hearings on this matter and issued orders that petitioner be housed in protective custody. (CT 104, 105, 165).

2. Despite these requests and orders, petitioner was placed in housing and transported with several known jailhouse informants. Numerous informants eventually supplied "information" about the case to the prosecutor. All of this "information" was generated after the requests for separate housing by petitioner and related orders issued by the court.

3. Four informants came forward to falsely claim that petitioner had spoken to them about his case. The informants did not allege that petitioner had confessed to them but claimed instead that petitioner told them that he was lying about the coerced confession, which was a central issue at the retrial.

4. Each of the informants was being used regularly by the prosecution in various criminal cases. (RT 8, 30, 43, 85). Each was commonly known to be a paid jailhouse informant.

5. Each of the informants testified that he had been housed near petitioner or transported with him on the way to court. During these times, they allegedly elicited information from him related solely to the confession issue. One of the informants, Anthony Cornejo, was called at the hearing on the confession. (RT 993).

a. On July 17, 1986, Cornejo was riding on the bus to court with petitioner. Cornejo claimed he initiated a conversation inquiring why petitioner was housed in a particular unit. Cornejo continued to question petitioner about the case. Petitioner allegedly told Cornejo that he had lied to his attorneys about the coercion of his confession and stated that the confession was freely given to the police. (RT 996).

b. Cornejo admitted that he had worked with the prosecutor on several cases and that he was usually held in the "snitch tank" in the county jail. (RT 998).

c. The court nevertheless refused to exclude Cornejo's testimony and clearly took it into consideration in denying the challenge to the confession. (RT 2250).

6. Here, Cornejo and the other informants were acting as government agents. They had provided numerous statements to the prosecutor's office in several murder cases and were actively testifying in other cases. In addition, they were provided benefits in return for their cooperation. (RT 1004).

7. Cornejo admitted that he initiated the conversation with petitioner, as did the informant in *United States v. Henry*, 447 U.S. 264 (1980), which held that the government cannot employ jailhouse informants to obtain information from a defendant in violation of the right to counsel.

a. Cornejo specifically inquired about petitioner's case and focused on the very issue that was central to petitioner's defense.

b. By his own admission, Cornejo was therefore not merely a passive listener, but instead actively sought information from petitioner, in violation of petitioner's Sixth Amendment rights.

8. Petitioner was prejudiced by the trial court's failure to suppress Cornejo's testimony. The informant's false and perjurious testimony undercut petitioner's testimony

regarding the circumstances of the confession.

9. Although the police denied any coercion in obtaining the confession, there was clear evidence to support the conclusion that petitioner was telling the truth about the confession having been coerced. Therefore, the erroneous admission of Cornejo's testimony was not harmless and the convictions based solely upon the confession must be reversed.

CLAIM 30: The Trial Court Erred in Denying Petitioner's Motion to Relitigate the 1538.5 Motion.

1. Petitioner filed a motion to suppress evidence based upon the illegality of his arrest. (CT 326). Trial counsel argued, on several bases, that petitioner was entitled to a *de novo* hearing.

2. One of the reasons offered was that petitioner's former counsel at the hearing had neglected to present a missing-juvenile report which indicated that Carl Carter, Jr. had been sighted at the rear of his own residence, safe and sound, an hour after the time at which petitioner said he had last seen him.

a. This report was not only reviewed by the arresting officers, it was in their possession at the time they arrested petitioner and they testified to being aware of its contents at that time.

b. The report was critical because it refuted Officer Sims' statement that he allegedly believed petitioner was the last person to see the boy before he disappeared. That alleged belief was cause for his immediate warrantless arrest of petitioner.

c. The report established that Carter had been seen outside the Carter home by his own brother at least an hour after petitioner had last seen Carter. Officer Sims knew this fact when he arrested petitioner.

d. Nonetheless, the court barred petitioner from relitigating the motion, stating:

"The court finds that defendant has not established through any evidence whatsoever that the defendant lacked an opportunity for a full determination of the merits of his motion as originally made and noticed at the previous hearing." (RT 283).

3. Because of trial counsel's admitted ineffectiveness at the first hearing and not having the missing report, petitioner was deprived of an opportunity for a full and fair determination by a fact-finder who could observe the credibility of the officers when being questioned about the report. This was a denial of his right to due process under the Fourteenth Amendment. Cf. *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (denial of full and fair hearing on suppression motion permits consideration of Fourth Amendment claim on federal habeas petition).

4. The piece of evidence excluded at the first hearing, the report of the missing juvenile, was critical to the probable cause determination. The report directly refuted one of the main reasons—if not **the** crucial factor—in arresting petitioner, as stated by the police officers.

a. Sims specifically testified that one of the reasons he suspected petitioner was that petitioner was the last one to see Carter. However, petitioner stated that he had last seen Carter safely walking toward home at approximately 6:00 p.m.

b. That statement by petitioner is, if anything, fully corroborated by the missing-juvenile report, which includes the statement from the boy's brother that he saw Carter at 7:00 p.m. at the rear of the Carter residence.

5. The introduction into evidence of the report and cross-examination of the officers would have undercut a finding of probable cause to arrest.

a. Officer Sims testified that at the time he arrested petitioner, all he knew was that:

i. Carterwas missing from home;

ii. Petitioner had undergone treatment in Atascadero State Hospital six years earlier for the assault of a young boy;

iii. the Carters had identified petitioner from a sketch based on a psychic's "vision"; and

iv. Petitioner had initially stated to the police in response to their question that he had not observed "anything unusual" on the day of the boy's disappearance, but subsequently mentioned taking the boy to Winchell's and returning him home unharmed, hardly an unusual occurrence.

b. The missing-juvenile report would have supported petitioner's claim that nothing "unusual" had occurred, that the boy had in fact returned home unharmed, and that petitioner was not the last person seen with the boy. That was the only factor that conceivably linked the boy with petitioner and the crime.

c. Evidence that the boy had been seen by his own brother an hour *after* petitioner reported seeing him would have destroyed the already tenuous claim of probable cause and would have corroborated petitioner's claim that the police lacked a substantial belief in petitioner's guilt.

6. Accordingly, the report of the missing juvenile was critical and would have led to a different result in the ruling on the motion to suppress. Failure to permit relitigation of the motion denied petitioner his rights to counsel, to reliable fact-finding procedures and to due process under the Sixth, Eighth and Fourteenth Amendments.

CLAIM 31: The Trial Court Erred in Failing to Grant Severance of Count III.

1. Prior to trial, petitioner filed a motion to sever Counts I and II from Count III. (CT 157). The trial court denied the motion and, after allowing petitioner to renew the

motion, issued a second denial. The court's denial was prejudicial error which requires the granting of the habeas petition.

2. Penal Code § 954 provides that crimes of the same class may be joined for trial. However, it has long been held that prejudice to a defendant may require severance of separate counts even though joinder may otherwise be permissible. In fact, Penal Code § 954 provides for severance "in the interests of justice and for good cause shown."

3. In *Williams v. Superior Court*, 63 Cal.3d 441 (1984), this Court stated that permissible joinder is only the beginning of the inquiry into whether a criminal defendant has been denied the right to a fair trial because of improper joinder of counts. "[T]he joinder laws must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (*Id.* at 448).

4. The *Williams* court set forth a four-step process for determining the severability of charges:

a. whether the charges would be cross-admissible in separate trials;

b. whether factors favor joinder;

c. whether one weak case would be bolstered by joinder with a stronger one, or, alternatively, whether two weak cases will be strengthened by joinder; and

d. whether one or more charges was a capital case.

In petitioner's case, examination of each of the *Williams* steps compels severance.

5. The initial step in a severance determination is to examine the cross-admissibility of the offenses, that is, "had the severance motion been granted, would the evidence pertinent to one case have been admissible in the other case under the Rules of Evidence which limit the use of character evidence or prior similar acts to prove conduct." (*Id.* at 448.) In this step, trial courts are guided by the well-settled principles relating to the use of character evidence to prove conduct.

a. Evidence Code § 1101 subdivision (a) forbids "evidence of a person's

character or a trait of his character . . . to prove his conduct on a specific occasion." However, subdivision (b) of that provision exempts from the bar against admissibility "evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact . . . other than [a person's] disposition to commit such acts." The provision lists a number of familiar—but frequently misapplied—avenues of admissibility for otherwise inadmissible uncharged acts: "Motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

b. In *People v. Thompson*, 27 Cal.3d 303 (1980), this Court explained the admissibility of uncharged offenses:

> Evidence of an uncharged offense is usually sought to be admitted as `evidence that, if found to be true, proves a fact from which an inference of another fact may be drawn.' [Citations.] As with other types of circumstantial evidence, its admissibility depends upon three principal factors: (1) the *materiality* of the facts sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material facts; (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence. [Citations.]
>
> In order to satisfy the requirement of *materiality*, the facts sought to be proved may be either an ultimate fact in the proceeding or an intermediate fact `from which such ultimate fact [] may be presumed or inferred.' [Citation.] Further, the ultimate fact to be proved must be `actually in dispute.' [Citation.] If an accused has not `actually placed that [ultimate fact] in issue,' evidence of uncharged offenses may not be admitted to prove it. [Citations.] The fact that an accused has pleaded not guilty is not sufficient to place the elements of the crimes charged against him `in issue.' [Citation.]

Id. at 315 (footnotes omitted; emphasis in original).

6. In the instant case, the killing of Carter would have no bearing on the killings in Counts I and II, and *vice versa*.

a. At issue in the 1976 murders, Counts I and II, was the perpetrator's identity. Thus, other-crimes evidence would only be admissible if it bore on that issue. Evidence of "common plan, scheme or design" is considered an "intermediate fact" which, if properly shown, can prove the "ultimate fact" of identity. In

other words, by showing a defendant's mark—"the criminal's calling card, as it were" (*People v. Tassel*, 36 Cal.3d 77, 86 (1984))—through evidence of similar past offenses, the identity of the perpetrator of a similar charged crime can be proved. The test for similarity, however, is strict:

> In ascertaining whether evidence of other crimes has a *tendency* to prove the material fact, the court must first determine whether or not the uncharged offense serves "logically, naturally, and by reasonable inference" to establish that fact. [Citations.] The court must "look behind the label described in the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong." [Citation.] If the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded. [Citations.]

People v. Thompson, 27 Cal.3d at 316 (emphasis in original).

b. Here, the only common marks shared between the first two crimes and the third was that the victims were young boys. However, Carl Carter, Jr., at age seven, was significantly younger than the other two. The differences between the crimes are many. The manner of killing in Counts I and II was by knife, while in Count III the victim was strangled. In Count III, the victim was known to petitioner and the killing was alleged to have occurred in petitioner's home, while in Counts I and II, the victims were strangers in a public park. The fact that all three victims were young boys is simply not enough to make the third killing admissible at a trial in the first two.

c. Just as Count III would be inadmissible at a trial on Counts I and II, the converse is true, that Counts I and II would be inadmissible at a trial on Count III. The issue in Count III was intent. Thus, the first two killings would only be admissible if they were probative of that issue. They were not. *Id.* at 321.

d. Assuming, *arguendo*, that Counts I and II would be admissible on some issue pertinent to Count III, or vice versa, the inquiry as to admissibility does not

stop here. The decision in *Thompson* mandates that the trial court examine any rule or policy limiting the introduction of relevant evidence: "Even if evidence of other crimes is relevant under a theory of admissibility that does not rely on proving disposition, it can be highly prejudicial." *id.* at 318. In short, the probative value of this evidence must outweigh its prejudicial effect." *ibid.*

e. In the instant situation, the prejudice from admitting the uncharged murders at a trial on either Counts I and II or on Count III would be overwhelming, and the probative value, if any, would be minimal. Thus, Counts I and II would be inadmissible at a separate trial on Count III, and likewise, Count III would be inadmissible at a separate trial on Counts I and II.

7. The next determination to be made in a severance analysis is whether factors exist which favor joinder. The traditionally regarded benefits of joinder were set forth in *People v. Matson*, 13 Cal.3d 35, 41 (1974): "'joinder of related charges . . . ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were tried in two or more separate trials.'"

a. The first concern, harassment of the defendant, was not a consideration in this case, as petitioner himself moved for severance. There were thus no significant, legitimate factors favoring joinder.

b. Counts I and II were considerably weaker than Count III. Although there was an alleged confession to all counts, Count III was supported by some physical evidence, while none was introduced on Counts I and II.

c. Furthermore, an identity defense was offered to Counts I and II, while none was offered in Count III.

d. Additionally, the evidence elicited at trial from eyewitnesses as to the 1976 case was favorable to defendant, in that the identifications and descriptions of

persons seen in the park were equivocal. This evidence would have had a clearer beneficial impact if these cases had been tried apart from Count III.

8. Lastly, and most importantly, this was a capital case, made so only through joinder.

a. Counts I and II carried no possibility of a death sentence and none could attach if they had been tried separately from Count III.

b. In addition, there were antagonistic defenses to the counts; there was significant evidence as to Counts I and II that other parties were responsible while the central defense in Count III was the possible psychiatric evidence going to the degree of the criminal act.

c. This psychiatric evidence was potentially contradictory to the defense in the other counts and required revelation to the jury on Count III of confidential information which could be used against petitioner on Counts I and II. This was a capital case through joinder only and therefore, coupled with the other reasons set forth above, joinder was highly prejudicial in this instance. Therefore, the trial court erred in denying the motion.

9. There is "a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." *Bean v. Calderon*, 163 F.3d 1073, 1084 (9th Cir. 1998). Misjoinder which "result[s] in prejudice so great as to deny [a defendant] his Fifth Amendment right to a fair trial" suffices to show a constitutional violation. *Id.*

10. Misjoinder exacerbates "the human tendency to draw a conclusion which is impermissible in the law: because he did it before, he must have done it again." *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985).

11. Petitioner was entitled to a reasoned determination of his culpability for the charged crimes. By joining unrelated charges which required antagonistic defenses, the

trial on the joined charges was fundamentally unfair in violation of Fifth and Fourteenth Amendment due process guarantees and heightened capital case reliability under the Eighth Amendment.

12. It also led to the likelihood that the jury would conclude that if petitioner killed Carter, he must have killed the other two victims, regardless of the evidence presented on the other counts. However, there was a great disparity in the strength of evidence on Counts I and II as compared to Count III.

13. Charging multiple unrelated counts of murders involving children was also likely to inflame the passions of the jury, and prevent reasoned deliberation and a just verdict. It violates due process, as well as the Eighth Amendment prohibition of cruel and unusual punishment, to convict and sentence a defendant to death based on passion and not reasoned deliberation. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 319-328 (1989).

14. "[I]t is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, than it is to compartmentalize evidence against separate defendants joined for trial." Studies establish "that joinder of counts tends to prejudice jurors' perceptions of the defendant" and that misjoinder which "resulted in prejudice so great as to deny [a defendant] his Fifth Amendment right to a fair trial" suffices to show a constitutional violation. *Bean v. Calderon, (quoting United States v. Lane,* 474 U.S. 438, 446 fn.8 (1986); *see also Lucero v. Kerby*, 133 F.3d 1299, 1315 (10th Cir.) ("Courts have recognized that the joinder of offenses in a single trial may be prejudicial when there is a great disparity in the amount of evidence underlying the joined offenses. One danger in joining offenses with a disparity of evidence is that the State may be joining a strong evidentiary case with a weaker one in the hope that an overlapping consideration of the evidence [will] lead to convictions on both.") This creates "the human tendency to draw a conclusion which is impermissible in the law: because he did it before, he must have done it again." *United States v. Bagley*, 772 F.2d 482, 488 (9th

Cir. 1985).

15. By joining the two sets of crimes, the prosecutor was able to bootstrap a weak case for two killings with slightly stronger, although fabricated, evidence of the Carter killing. By stressing his speculation about lurid details of the sexual nature of the Carter killing, the prosecutor inflamed the passions of the jury with the result being that petitioner did not receive the reasoned consideration of his guilt and punishment which the constitution required. It is reasonably likely that had the charges not been improperly joined, petitioner would not have been convicted of special circumstance murder and been sentenced to death.

16. Had Counts I and II not been joined, it is likely that petitioner would not have been convicted on those counts. Without those convictions, Count III would not have been death eligible, since the sole special circumstance at the second trial was multiple-murder. If that charge was no longer death eligible, the jury would not have been death-qualified, further lessening the likelihood of a conviction of first-degree murder on Count I.

17. This improper joinder violated petitioner's right to due process under the Fifth and Fourteenth Amendments, to a fair trial by an impartial jury under the Sixth Amendment and heightened capital case reliability and freedom from cruel and unusual punishment under the Eighth Amendment. Reversal is mandated, as the judgment here was entirely "swayed by the error," *Kotteakos v. United States*, 328 U.S. at 765, and the error had substantial and injurious effect or influence in determining the jury's verdict, resulting in actual prejudice. *Brecht v. Abrahamson*, 507 U.S. at 623, 637, quoting *Kotteakos*, 328 U.S. at 776.

18. The prosecutor's arguments supporting joinder were meritless. He argued that because "the nature of the defense in this case is some sort of a psychiatric defense," joinder was proper because facts of all murders would necessarily be cross-admissible. (RT A42).

19. The prosecutor also argued that joinder was proper because "[w]e don't have any identity issues. Mr. Memro tells us that he did it in this case." (RT A43). The defense at trial was mistaken identity. While trial counsel did concede the Carter killing, counsel denied any role in the 1976 killings. The prosecutor's assertion that a purported confession existed did not dictate that the defense could not contest petitioner's identity as the 1976 killer.

20. While discussing defense counsel's motion for severance, trial counsel said "aside from what I mentioned in chambers." The *in camera* discussion held in chambers was not recorded and was never reconstructed. (RT A41). It is impossible at this time to assess what occurred during that off-the-record session. Petitioner's constitutional right to be present was also violated, since he was excluded from that in-chambers session.

21. In making its ruling denying severance, the court also lacked critical evidence. At the time of the severance motion, the 400 pages of discovery, consisting largely of Bell Gardens police reports detailing alternate suspects, had been kept from the defense, and thus from the court. These reports included three individuals who admitted to taking part in the 1976 homicides, as well as others who had been identified by eyewitnesses from the park. Thus, petitioner was denied crucial evidence which would have enabled him to mak an adequate showing regarding how the defenses would be antagonistic and the resulting prejudice from the joinder.

22. After receiving the discovery and after a new case (*People v. Smallwood*) was decided, trial counsel renewed the motion for severance. (See RT 132). Trial counsel requested an *ex parte* conference so that trial counsel could explain to the court how the defense would be antagonistic. The trial court refused, stating:

> Due Process is a two-way street; and to me, I will not condone a procedure where at a point in the proceedings where you are asking for a separate trial, you say, well, we are going to tell you why we need a separate trial but the prosecution can't know about it. If that's reversible error, it's reversible error; but I won't condone that procedure.

(RT 134-35).

23. The trial court thus required trial counsel to explain to the prosecution what it's defense was going to be prior to trial, or to forego its severance motion. Trial counsel did present argument regarding severance. The trial court erroneously concluded that no new circumstances existed, which warranted reversing the prior ruling denying severance. This decision was flawed based on the importance of the new discovery. It also violated petitioner's Sixth Amendment right, as the court required trial counsel to disclose it's entire defense to the prosecutor.

24. Denial of the severance motion denied petitioner his right to a fundamentally fair trial and due process of law as guaranteed by the Fourteenth Amendment. *See Featherstone v. Estelle*, 948 F.2d 7941, 3051 (9th Cir. 1991); *Tribbitt v. Wainwright*, 540 F.2d 840 (5th Cir. 1976).

CLAIM 32: The Trial Court Erred in Failing to Conduct an *In Camera* Hearing Regarding the Renewed Severance Motion.

1. Petitioner's motion for severance was initially denied by Judge Long after he held an *in camera* hearing regarding the inconsistent defense that petitioner planned to offer to the separate counts. (CT 281). Trial counsel renewed the motion after this Court rendered its decision in *People v. Smallwood*, 42 Cal.3d 415 (1986). (CT 233). That motion was filed in November 1986 but not heard until February-March 1987. (CT 353). By that time Commissioner John A. Torribio was assigned to handle the capital case.

2. At that hearing, trial counsel asked Commissioner Torribio for permission to make an *in camera* presentation of the inconsistent defenses, which was one basis for granting the motion. (RT 134). On his own motion, and without any objection to this *in camera* procedure by the prosecutor, Commissioner Torribio erroneously denied the defense the opportunity to present the supporting evidence *in camera*. (RT 134-135).

3. The denial of the request for an *in camera* hearing prejudiced petitioner by

coercing him to choose the assertion of one constitutional right to the detriment of another. Thus, in order to protect his right to counsel under the Sixth Amendment and his right against self-incrimination under the Fifth Amendment and not to give the prosecutor an unfair preview of the planned defense strategy, petitioner was forced to give up his right to due process of law by failing to present his basis for severance of the charges. The Supreme Court has long held that it is a violation of a defendant's rights to force upon him a situation where he must waive one constitutional right simply to assert another. *See, e.g.*, *Simmons v. United States*, 390 U.S. 377 (1968).

4. The trial court denied the request solely on the basis that it would purportedly be "unfair" to the prosecution. (RT 134-135).

5. Following its refusal of an *in camera* hearing, the court denied the severance motion without the benefit of the details concerning the inconsistent defenses to the charges. (RT 186).

6. In doing so, the court ignored the purpose for which *in camera* presentations may be made by either party and the interests served by such an *ex parte* proceeding. For example, the prosecution can present a confidential informant at an *in camera* hearing pursuant to Evidence Code § 1042; defense counsel can present a request for funds pursuant to Penal Code § 987.9 *in camera*.

7. Inexplicably, the trial judge later permitted an *in camera* hearing upon defense request barely a month after denying the request on the severance motion. In that instance, the judge allowed defense counsel to present *in camera* an offer of proof regarding the contents of notes that had been confiscated from petitioner. (RT 4/6/87). The purpose behind the two *in camera* hearings was identical: to protect petitioner's right not to disclose attorney-client confidential matters in the process of asserting another constitutional right. The court had no valid reason for denying the *in camera* session during the severance hearing.

8. The denial of this right must be measured under the *Chapman* standard because the information which would have been presented fully supported the granting of the severance motion. At the prior *in camera* hearing, defense counsel laid out the absolute conflict in the defense to the two sets of charges. (RT 4/18/86). Had the trial court examined these facts as well as the general arguments put forth in the open session, the severance motion would have been granted. The court was correct when it noted on the record that it may have been reversible error to do so. (RT 134-135).

9. Reversal of all counts is mandated because of the denial of the request to hold the *in camera* hearing.

CLAIM 33: The Trial Court Erred in Denying Petitioner's Motions for New Counsel.

1. The Supreme Court has recognized repeatedly the central role of the defendant's right to counsel in the criminal justice system.. *See, e. g., Holloway v. Arkansas*, 435 U.S. 475 (1978); *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Chandler v. Fretag*, 348 U.S. 3 (1954); *Glasser v. United States*, 315 U.S. 60 (1942); *Powell v. Alabama*, 287 U.S. 45 (1932). The Supreme Court has described this right as "fundamental," *(Gideon*, at 344), and has stated that "[the] assistance of counsel is often a requisite to the very existence of a fair trial." *Argersinger*, at 31.

2. In spite of this vast body of law recognizing the necessity of a working attorney-client relationship, the trial court eviscerated petitioner's right and forced him to accept representation from attorneys where there was a complete breakdown in the attorney-client relationship. Petitioner received ineffective assistance of counsel due to these conflicts which violated petitioner's Sixth Amendment right to the effective assistance of counsel.

3. On May 9, 1986, petitioner asked Judge Long for new counsel to be assigned, citing the "lax and unconscientious performance" of his attorneys. (RT A59). Petitioner also asked to be sent back to San Quentin. The court did not address petitioner's *Marsden* (*People v. Marsden*, 2 Cal. 3d 811 (1970)) request and denied the request to be returned to San Quentin.

4. On June 6, 1986, petitioner again requested that counsel be removed and new counsel assigned. The court held an *in camera* hearing to discuss a letter that petitioner filed with the court, dated May 20, 1986, outlining his complaints against his attorneys.[10] (RT A66-A151). The complaint detailed the:

> complete and irreparable breakdown and the continuing total lack of any meaningful attorney/ client relationship, my continuing total lack of any confidence and and/or [sic] trust in these attorneys, their repeatedly demonstrated lack of honesty with me, and their totally inexcusable lack of diligence in investigating and preparing a proper and adequate defense in this case.

(RT A71).

5. Petitioner explained that before counsel was appointed, counsel had promised to keep petitioner apprised of all developments in the case and had agreed to consult with petitioner while making certain strategic decisions. (RT A72-A73). Petitioner cited examples of trial counsel's lack of diligence. Petitioner had urged counsel to attempt to locate two key eye-witnesses; by the time the hearing was held, one of the witnesses was no longer available and counsel still had not attempted to locate either one. (RT A73-A74). Neither of the witnesses were named, but both were relevant to pre-trial motions and one "claimed he not only had important first-hand information . . . but could also provide us with names and locations of a number of other people who could and most likely would testify similarly." (RT A740). Petitioner's complaint concluded by noting that counsel was unable to adequately "deal with security problems and housing conditions"

---

[10] This letter was entered as Court Exhibit 1 and is currently sealed.

in the jail. See also Claim 7. (RT A77).

6. Trial counsel Peter Larkin and Michael Carney denied petitioner's claims, after which Judge Long announced that he would take the weekend to decide the request. On June 9, 1986, Judge Long denied petitioner's motion. (RT A152-157).

7. Six months later, after the court had continued the trial over petitioner's objection, in violation of his right to a speedy trial, petitioner again renewed his *Marsden* motion on November 3, 1986. The motion was made before Commissioner Torribio, who had replaced Judge Long following Judge Long's recusal due to the appearance of bias. After issuing continuance after continuance over defendant's objections, on March 25, 1987, the court held a *Marsden* hearing and allowed petitioner to explain counsels' ineffectiveness. (RT 200). At the outset of this hearing, petitioner requested that the court provide him with a transcript of the prior hearing because he continued to have the same types of problems and he could not remember them in detail. The court noted that this was "a very reasonable request, but that couldn't be done." (RT 11/3/86 at 25).

8. Petitioner complained that: a) he was not being consulted by trial counsel on strategy; b) trial counsel decided, over petitioner's objections, to concede guilt on Count III; c) trial counsel failed to request *Pitchess* materials and petitioner felt that the issue would not be preserved for appeal if they were not at least requested; d) trial counsel was unprepared; and e) trial counsel had not made full efforts to locate witnesses. (RT 199).

9. The court noted that the matter had been assigned for trial and that the court was now running up against the 10-day rule under Penal Code § 1382. The court indicated that petitioner had refused to waive time on the case and he could not get the transcript in less than 7-10 days; therefore, the court felt it had no choice but to deny the request for the transcript.[11] The court also noted that those prior claims had been heard and denied by

---

[11] The trial court noted that there would be no continuances without petitioner's personal waiver because of the respect the judge had for the right to a speedy trial and his belief that these rights are

Judge Long and, thus, could not be raised again. Petitioner contended that they were indicative of the continuing problems with defense counsel.

10. Rather than assessing the individual concerns enumerated by petitioner, the court lauded trial counsel's reputation as effective and rested on the imminence of trial to reject the request:

> The problem is that Mr. Larkin is a respected capable attorney. He is going to make certain suggestions to you as to the strategy in how to proceed. Sometimes the client doesn't understand it or doesn't accept it, but at the present time, particularly in view of the fact the matter is scheduled for trial April 1st, and obviously no other counsel can pick this case up and be ready by April 1st. There has been numerous continuances of this matter.

(RT 200).

Petitioner responded that he had "been asking for new counsel for nine months now." (RT 200). The court recognized that fact but rejected petitioner's request without inquiring into the substance of the conflict.

11. However, the only reason the trial was imminent was that the trial court had summarily rejected petitioner's prior requests for new counsel. The court, by its own actions, created the situation where there was not enough time to appoint new counsel and then used that as a basis to deny petitioner's motion.

12. The fact that trial counsel had a reputation for competency was not probative of whether a constitutionally adequate attorney-client relationship existed and whether counsel was representing petitioner effectively. The court was required to hear and to consider specific evidence of the representation before ruling on the merits. *See People v. Crandell*, 46 Cal. 3d 833 (1988). The court's tone and tautological reasoning indicated its

---

personal to the defendant. (RT 11/3/86 at 72). However, after denying the *Marsden* motion, the court almost immediately granted defense counsel's request for a continuance over the strenuous objection of petitioner. Once that continuance was granted, the transcript of the prior hearing should have been made available to petitioner.

intent not to give serious consideration to petitioner's legitimate request. Having finally decided to hold a *Marsden* hearing, it was incumbent on the court to give petitioner a fair hearing and address his individual concerns.

13. At this hearing, petitioner again complained that he did not trust defense counsel because they had not kept their promises to him regarding providing discovery and conducting a proper investigation. (RT 11/3/86 at 3). Petitioner specifically complained about the refusal of counsel to interview a witness who had allegedly provided information to the police that led to petitioner's arrest. Defense counsel stated that he believed this witness would hurt the motion to suppress evidence but admitted that he had not conducted any interview to support that opinion. Petitioner contended that this was precisely the problem: counsel could not make an informed decision until the witness was interviewed.

14. Petitioner also complained that a witness central to the *Pitchess* motion had not been interviewed. Defense counsel said that he had tried to locate the witness after the June *Marsden* hearing but the witness was now unavailable. (RT 11/3/86 at 17).

15. Petitioner also complained that several medical tests were not conducted because defense counsel, without any investigation whatsoever, "determined" they were not relevant. (RT 11/5/86 at 55). Petitioner also complained that defense counsel had not obtained petitioner's medical records from Atascadero State Hospital. (RT 11/5/86 at 60).

16. At the conclusion of the hearing, the court denied the *Marsden* motion. (RT 11/5/86 at 60). A defendant cannot be forced to choose between incompetent counsel and no counsel at all without destroying the fundamental fairness and accuracy of the criminal proceeding. *Crandell v. Bunnell*, 144 F.3d 1213, 1216 (9th Cir. 1998). Here, trial counsel presented petitioner with just such a choice.

17. Petitioner renewed the request for new counsel on March 25, 1987 shortly before trial began. He raised two separate issues: a) defense counsels' intention to concede petitioner's guilt to a second-degree murder charge on Count III over petitioner's

specific objection; and b) defense counsels' failure to seek *Pitchess* material on additional detectives from South Gate Police Department. (RT 3/25/87 at 66). The court again denied the motion based on the imminent trial date.

18. After the verdicts in the guilt phase were returned and prior to the penalty phase, petitioner renewed his request for new counsel on June 3, 1987. (RT 2893). Petitioner stated that there was no attorney-client relationship and he objected again to the concession of guilt in the Carter murder and to the failure to be kept informed of the penalty phase preparations. (RT 2893).

19. The Ninth Circuit has eloquently spoken about the requirements of representation by counsel with whom a defendant has a conflict:

> We think, however, that to compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever. *See Entsminger v. Iowa*, 386 U.S. 748, 87 S. Ct. 1402, 18 L. Ed. 2d 501 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Of course, a court is not required to provide an indigent accused with any particular attorney whom he may desire, and we think that the state court might very properly have required Brown to accept the assistance of some other of the great number of competent attorneys associated with the Public Defender's office of Los Angeles County. The problem arises because the state court did not, in our opinion, take the necessary time and conduct such necessary inquiry as might have eased Brown's dissatisfaction, distrust, and concern. And, we think it not unreasonable to believe that had Brown been represented by counsel in whom he had confidence he would have been convicted, if at all, of no more than the offense of manslaughter.

Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970).

20. Petitioner expressed his dissatisfaction and general refusal to cooperate with trial counsel from the beginning. The trial court was obligated to take some measures to correct the situation.

21. A defendant is "entitled" to discharge his appointed counsel if "defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." *People v. Crandell*, 46 Cal.3d 833, 854 (1988) (*citing People v. Marsden*, 2 Cal.3d 118, 124 (1970)). This Court has consistently held that

where "the defendant's right to the assistance of counsel would be substantially impaired,"there is no discretion: a defendant's request to have his counsel replaced must be granted. *People v. Moore*, 47 Cal.3d 63, 76 (1988) (*citing People v. Smith*, 38 Cal.3d 945, 956 (1985) and *People v. Carr*, 8 Cal.3d 287, 299 (1972)). As explained in *People v. Sanchez*, 12 Cal.4th 1, 36 (1995), the essential consideration in evaluating the ongoing viability of an attorney-client relationship is trust. Federal law is similar. Where there is a "serious breach of trust and a significant breakdown in communication that substantially interfere[s] with the attorney client relationship," it is error to deny a client's motion to substitute counsel. *United States v. Adelzo-Gonzalez,* 268 F.3d 772, 779-780 (9th Cir. 2001). Due to the lack of trust and the inability to confer, the attorney-client relationship was completely undermined. Under both California and federal law, trial counsel should have been removed. *See, e.g., Crandell*, 46 Cal.3d at 854; *Adelzo-Gonzalez*, 268 F.3d at 779-80.

22. The Sixth Amendment requires an appropriate inquiry on the record into the grounds for a *Marsden* motion and the matter must be resolved on the merits before the case goes forward. *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (*en banc*). If failure to conduct the proper inquiry results in the constructive denial of counsel, it constitutes *per se* error. *Id.* at 1027.

23. Petitioner was denied his Sixth Amendment right to counsel because there was a conflict and subsequent breakdown of communication between the attorney and the client that prevented effective representation. *Schell v. Witek,* 218 F.3d 1017 (9th Cir. 2000) (*en banc*)(stating that defendant's constitutional rights are violated where "the conflict between [the client] and his attorney had become so great . . . that it resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment.") "To compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him

of the effective assistance of any counsel whatsoever." *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970).

24. The failure to hold an adequate hearing and examine the nature of the dispute between petitioner and trial counsel and the breakdown in the relationship between them, violated petitioner's constitutional rights. Summary denials based on conclusory statements are insufficient. *See, e.g.*, *Hudson v. Rushen*, 686 F.2d 826, 829 (9th Cir. 1982) ("Thus, the state trial court's summary denial of a defendant's motion for new counsel without further inquiry violated the Sixth Amendment.") (internal citations omitted). The Sixth Amendment requires on the record an appropriate inquiry into the grounds for such a motion and that the matter be resolved on the merits before the case goes forward. *See Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991). "Given the commands of Sixth Amendment jurisprudence, a state trial court has no discretion to ignore an indigent defendant's timely motion to relieve an appointed attorney." *Schell v. Witek*, 218 F.2d 1017, 1025 (9th Cir. 2000) (*en banc*).

25. The reasons for the requirement of a more searching inquiry are many:

> A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom. Indeed, [when] inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record: whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choice of trial tactics and strategy. Thus, a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney. A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention is lacking in all the attributes of a judicial determination.

People v. Marsden, 2 Cal. 3d 118 (1970) (Internal citations omitted).

26. The trial judge's duty to give a fair hearing to petitioner did not merely require him to passively listen to petitioner, but required an active, "careful inquiry into the defendant's reasons for claiming incompetence." *People v. Ivans*, 2 Cal. App. 4th 1654 (1992). The trial court did not make such an inquiry. To the contrary, the court did not even address petitioner's allegations. The court merely announced that trial counsel "is a respected capable attorney," and denied the motion.

27. The error was not merely the denial of the *Marsden* request, though that denial was indeed erroneous, but was also the failure to even consider the request. By failing to consider petitioner's claims, the trial court denied petitioner his right to effective representation and deprived petitioner a fair trial. His rights under the Sixth Amendment and Fourteenth Amendments were violated. By ignoring the rights and privileges established in *Marsden*, the trial court violated petitioner's rights under state law and the state constitution, which deprived petitioner of a state-created liberty interest in violation of the Due Process Clause. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974).

28. At each hearing, petitioner noted that he was not qualified to represent himself and that he needed the assistance of counsel regarding the conduct of the hearing on the *Marsden* issue. Moreover, immediately after the denial of the first motion, petitioner wrote to the judge asking for assistance of counsel in seeking pretrial review of the court's ruling.

a. Petitioner knew that he was not qualified to represent himself and even acknowledged such to the court. He was facing the most severe penalty possible and understood that there were complex issues, especially in light of the fact that his conviction had already been reversed.

b. At no point did the court inform petitioner of the showing he would be required to make in order to have his counsel relieved; nor did the court consider appointing the specifically requested independent counsel to advise

or assist petitioner in making the requisite showing.

c. Petitioner's court-appointed trial counsel never factually disputed the complaints but merely made conclusory statements that they were expending substantial time on his case. They had a clear conflict of interest with their client on this matter and did not honor his request to seek pretrial review of the denial of the motion.

d. The attorneys misrepresented to the court the amount of time they were spending on petitioner's case. For example, co-counsel Carney told the court that he had spent at least 50 hours researching a Sixth Amendment issue (RTA 81); however, his time records subsequently filed with the court reflect only 8 hours total for preparation of that motion. (CT 434).

29. Petitioner could not contradict such assertions of trial counsel because he had no access to independent counsel who could fully investigate and represent him in these hearings.

30. The record shows that the trial court unreasonably failed to discover these discrepancies. The record also demonstrates that trial counsel misrepresented significant facts to the trial court.

31. In an analogous case of self-representation on a habeas petition following imposition of a death sentence, the Ninth Circuit described the pitfalls the indigent defendant faces in such a situation:

> Compounding this burden, the petitioner is often illiterate or poorly educated and yet must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, may have been violated. Such a task is "difficult even for a trained lawyer to master," and, understandably, is often beyond the abilities of most prisoners. [Citation.]

Brown v. Vasquez, 952 F.2d 1164, 1167 (9th Cir. 1991).

32. The denial of petitioner's request for counsel resulted in a denial of his right to counsel at a critical stage of the proceedings.

33. The trial judge also used the assertion of petitioner's speedy trial rights as a pretext to deny him the opportunity to prepare fully for the *Marsden* hearings. At the second hearing in November 1986, petitioner was denied counsel to assist him. Additionally, he was informed that because he had not waived his right to a speedy trial, the court would deny his "reasonable request" for a transcript of the prior *Marsden* hearing because of speedy-trial time constraints. The judge spoke of his "respect" for the speedy trial right and how he considered this right personal in nature and waivable only by the defendant. Allegedly because of the court's desire to honor this right, he denied the request for a transcript and gave petitioner two days to gather his notes and present his claims on the motion. However, once the judge denied the motion for new counsel, he immediately continued the trial again solely on the request of defense counsel for another two months and eventually for a total of four months after this *Marsden* hearing, over the strenuous objection of petitioner.

34. At the last *Marsden* hearing, the court used the proximity of the trial date as the sole reason to deny petitioner's motion finding now that the matter was too close to trial for the court to grant the motion. Paradoxically, the trial court used petitioner's speedy trial right to deny petitioner's right to counsel and his right to counsel to deny his speedy trial right. Thus, he was denied both rights by sleight of hand.

35. Throughout these proceedings, the trial court denied petitioner'ss rights under the state and federal constitutions. The court continually used petitioner's assertion of his right to a speedy trial as a means of denying him a full and fair hearing on his claims of ineffective assistance of counsel. It has long been held improper for a court to burden the defendant's exercise of a constitutional right by requiring the relinquishment of another. *See, e.g., Simmons v. United States.*

36. After petitioner was convicted in the guilt phase of the trial, he again moved for new counsel. Then, the trial court failed to apply the appropriate standard for

determining the motion. Following conviction, under California constitutional standards, a defendant must present only a "colorable claim that he was ineffectively represented at trial" in order to have the court appoint counsel to fully investigate and present the motion. *People v. Stewart*, 171 Cal.App.3d 883 (1985); *People v. Garcia*, 227 Cal.App.3d 1369 (1991); *People v. Walker*, 14 Cal.App.4th 1615 (1993).

37. Petitioner was complaining about the implicit entry of a guilty plea to the murder of Carl Carter, Jr. This was the equivalent to a motion to withdraw a guilty plea and mandated the appointment of new counsel to investigate the claim.

38. Because the trial court denied petitioner's right to a full and fair hearing on the *Marsden* issues and his right to appointment of counsel to pursue these issues, the convictions must be reversed.

39. When an indigent defendant seeks to have his appointed counsel removed from his case, the court under California constitutional standards must consider specific examples of the inadequate representation raised by the defendant. *People v. Webster*, 54 Cal.3d 411, 435 (1991). Once the court has granted a fair hearing to the defendant, the court must exercise its discretion in deciding whether to grant the motion. "[D]enial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed counsel would `substantially impair' the defendant's right to the assistance of counsel." *ibid.* The defendant must demonstrate either constitutionally inadequate assistance of counsel or a fundamental breakdown of the attorney-client relationship. *id. at* 436.

40. Here, petitioner met both parts of the test. Defense counsel admitted that they had failed to contact material witnesses regarding the pretrial motions.[12] At least one witness became unavailable because trial counsels' failure to pursue the investigative lead

[12] In fact, almost all of the "pre-trial motions" were held in conjunction with the trial because of the lack of advance preparation by trial counsel.

provided by petitioner in a timely fashion. This witness was critical on the central issue in the case—the validity of the confession. Another witness was never called on the motion to dismiss for interference with attorney-client confidentiality, which defense counsel referred to as a motion that would require the entire case to be dismissed. The examples brought to the trial court's attention by petitioner reflected constitutionally inadequate counsel and mandated granting the motion.

41. Moreover, there existed a complete and utter breakdown of the attorney-client relationship.

a. Petitioner did not complain of any problems with counsel or raise the *Marsden* motion until almost a year after the initial appointment of counsel. He cooperated in giving them more than adequate time to become familiar with and prepare his case. The record reflects that it was only after it became obvious that they were not reasonably performing their job that he appropriately sought a change in counsel. As they resisted his efforts and contradicted his testimony in these hearings, his distrust of them legitimately increased. During almost all of 1986, petitioner and his attorneys were at odds with each other.

b. The relationship continued to deteriorate as counsel failed to adequately investigate and prepare the defense case in a professional and timely manner, thus requiring counsel to repeatedly overrule petitioner's exercise of his right to a speedy trial. Counsels' time records (unavailable to petitioner at the time) show that they were not expending the amount of time reasonably necessary to bring the case to a timely trial date. For example, between June 1986 and November 1986, following another three continuances over petitioner's objection, trial counsel *together* averaged less than five hours per week on the case. (CT 288, 334).

c. They had no excuse for the abandonment of petitioner and his assertion of his right to a speedy trial. Their refusal to consider his interests caused a fundamental breakdown in their relationship and required their removal from the case.

42. In addition, petitioner had entered a plea of not guilty to the murder of Carl Carter, Jr. He was informed by trial counsel prior to the beginning of trial that counsel would concede guilt on this count in the opening statement and at closing argument. Petitioner objected strenuously to this approach and advised the court. Despite this objection, counsel conceded guilt on that count and argued only that it was not a first-degree murder. (RT 2796-2797). In essence, counsel, without a specific waiver from his client and over his client's specific objection, entered an implicit guilty plea to the charge of second-degree murder. Such abandonment of a client is grounds for reversal for ineffective assistance of counsel. *See United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). The trial court was warned about this action but took no steps to preserve petitioner's rights, either by appointing new counsel or taking a waiver of rights on the record. *See Boykin v. Alabama*, 395 U.S. 238 (1969); *In re Tahl*, 1 Cal.3d 122 (1969).

43. Although this was not a "close case" and new counsel should have been appointed, any doubt about whether trial counsel should have been relieved should have been resolved in petitioner's favor. As discussed herein, trial counsel were also necessary witnesses in the case. Their role as witnesses conflicted with their role as petitioner's counsel and further necessitated their removal. Counsel failed to inform petitioner of these rights, further demonstrating (a) their conflict of interest and (b) the lack of relationship between counsel and their client.

CLAIM 34: The Trial Court Erred in Failing to Grant Petitioner's Requests to be Housed in High Security.

1. In August 1985, counsel for petitioner requested that petitioner be housed in

the high security, individualized cells at Los Angeles County Jail. The request was made for petitioner's security and to avoid contact with jailhouse snitches. (CT 322). The court issued a recommendation to the Los Angeles County Sheriff requesting separate housing. (CT 322).

2. On December 3, 1986, trial counsel informed the court that petitioner had transcripts stolen from his cell while at the Hall of Justice and requested an order or recommendation to provide petitioner with separate housing:

> What I request of the court would be an order or at least recommendation – I have asked for this before from other judges. We have gotten the recommendation; however, it has never been followed . . . He is now in a row where some snitches have been placed and now some of those snitches are – they are professional snitches . . . one of them is next door to him and since that time, the District Attorney is getting calls saying I have got a snitch that is going to testify. The last snitch that I heard was going to testify, I heard about it before the District Attorney did . . . we have never had snitches in this case before.

(RT A-312-3, A-312-4).

3. The court agreed with counsel and said he would "recommend and encourage the Sheriff's department" to provide petitioner with separate housing. The Court told Mr. Larkin that "I certainly think that you have shown adequate grounds," though it claimed that the final decision was the Sheriff's to make. (RT A-312-5).

4. By January 9, 1987, over a month after the court issued its recommendation, petitioner still had not been provided separate housing. Trial counsel had requested that petitioner be housed separately from the snitches for over a year. (RT 69). **By this time, however, four jailhouse snitches had contacted the prosecutor to falsely testify against petitioner.**

5. Trial counsel explained this dilemma to the courts:

> All of these informants have been placed in the row where Mr. [Reno] has been placed. They've been placed by each other also, and every time we come back to court we have a different informant that's involved in this case. (RT 70).

6. The judge finally issued a tentative order for petitioner to be housed separately. The court added that if the order was not complied with, no additional snitches, with the exception of the four already prepared to testify, would be allowed to testify. (RT 69). The only rationale for this order was the Court's suspicion that the snitches' testimony at best lacked credibility, and at worst, was perjury.

7. Even with the order, however, by January 14, 1987, petitioner was not moved to a different row. The prosecutor brought this fact out in court in an attempt to evade the court's threat of disallowing new informants to testify. He explained that more informants had been coming forward who "I would think wouldn't violate the spirit of the court's order" when you take "the literal words that the court spoke the other day." (RT 98).

8. At this point, not only were snitches on the same row as petitioner, but Sidney Storch, another well known professional snitch, was in the neighboring cell. (RT 98). Professional snitch Michael Sterioti was housed only two cells away. (RT 12). Professional snitch Leslie White was housed on the same row as petitioner. Trial counsel's repeated requests to have petitioner housed separately were ignored.

9. Ultimately, Storch, Sterioti, White and Anthony Cornejo all testified before the court. Anthony Cornejo testified at the §402 hearing and was instrumental in having petitioner's confession admitted. Cornejo claimed that while on a bus, petitioner admitted that his confession was voluntary and that he was fabricating the accusation that the confession was coerced:

> He admitted to making the statements to the police. He admitted making the statements freely to the police. And he said – The quote was, "that was the only thing I had going for me on my appeal was to say that I was beat up and coerced and had the statements beat out of me . . . I asked him, were your *Miranda* warnings read. He said, yes, they were.

(RT 996).

10. The defense vigorously opposed the admission of the confession on the basis that the confession was both involuntary and false. Cornejo "corroborated" the police

officers' testimony and directly impeached this defense. Cornejo provided a basis for denying petitioner's motion to suppress the purported confession.

11. The trial court's refusal to rule on the admissibility of Cornejo's testimony before the jury added uncertainty and further prejudiced the defense. (RT 993). Trial counsel was unable to adequately prepare a defense because the admissibility of critical evidence in rebuttal was uncertain.

12. The prejudice caused by the failure to move petitioner away from the snitches was great. Prior to ruling on the admissibility of petitioner's purported confession in the hearing, the trial court heard from four snitches, one of whom testified about petitioner's purported confession. Had petitioner received the special housing counsel had requested, this snitch testimony would have been unavailable. Cornejo's testimony in particular was one of the key factors that led to petitioner's conviction.

13. Cornejo's testimony was perjurious and the prosecutor committed misconduct in putting it before the court.

14. The failure to issue an order for separate housing until after the prosecution had ample opportunity to arrange for jailhouse snitches to testify denied petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

CLAIM 35: The Trial Court Erred in Failing to Order Separate Transportation for Petitioner.

1. Petitioner was repeatedly transported on buses with known jailhouse snitches. This transportation continued even after informants claimed that petitioner confessed to them and after they had already contacted the prosecutor to testify against petitioner. Nevertheless, the Sheriff's Department continued to transport petitioner with the professional snitches.

2. The trial court initially responded to petitioner's request for separate transportation dismissively. On December 3, 1986, the court claimed that transportation

arrangements were up to the Sheriff and he was powerless to order the Sheriff to do anything differently. (RT A-312-5).

3. Trial counsel again asked that petitioner be provided special transportation for the following day. There had been "a problem with Mr. Cornejo" last time petitioner had been transported with the snitches and counsel had information that at least one of the snitches was scheduled to be on the bus with petitioner the following day. (RT A-312-7). The trial court issued a very limited order:

> I will order special transportation Friday, December 5. I will order special transportation for this date only. It is not meant to be any kind of a conclusive order or to be argued that I have ordered it once; therefore, I have to order it forever.

(RT A-312-8).

4. Trial counsel raised the issue of petitioner's being transported with known professional snitches on December 5, 1986. The court explained that the Sheriff's job of transporting prisoners was difficult, and providing separate transportation would require another available vehicle. (RT A-319).

5. Trial counsel noted that White, Sterioti and Cornejo were all transported on the bus with petitioner, yet only Cornejo had a case pending at that courthouse. The court refused the request:

> I like my orders followed, and if they are not, I take it as – I am not going to put myself in a position of having my orders ignored because they are illegal. It seems incumbent upon an effective judicial system that orders are framed so they can be enforced. As to the Sheriff's department, he controls prisoner population and decides where they are housed, what their food is, what they are dressed in, how they are treated as long as they get to and from court on time.

(RT A320). The court was less concerned with the violation of petitioner's constitutional rights by the prosecutors use of professional snitches than it was with the appearance of the Sheriff flouting the court's order.

6. On January 9, 1987, petitioner was still regularly transported on a bus with

jailhouse informants. Trial counsel renewed his request to have petitioner transported separately. The trial court again denied the request stating that the order would be unenforceable. (RT 76).

7. On April 3, 1987, petitioner told the court that Anthony Cornejo had threatened his life while being transported to court.

8. Thereafter, the trial court issued an order prohibiting any "known, present snitches" to be transported on the same bus as petitioner. (RT 290). The judge ordered that if any snitch was transported with petitioner he would be barred from testifying.

9. The prosecutor noted that trying to order the Sheriff's Department to do anything is "like talking to a polar bear" and suggested that the court order the Commander of the Jail appear in court so that the court could issue the order effectively. Previously, the court had claimed that there was no way to order the Sheriff's Department to do anything, but since now the snitches were "consuming the time of the court and counsel," the court found a way *after four snitches had been permitted to ride with petitioner and come up with stories to offer the prosecutor.* (RT 290). There was no subsequent indication that the trial court lacked the authority to issue this order or ensure compliance with it.

10. During petitioner's first trial in 1979, that trial court had no difficulty issuing special transportation orders. The trial court issued an order to provide special transportation for petitioner, which was never rescinded. The jail-court liaison officer from the Sheriff's Department had suggested that petitioner be provided separate transportation. He told trial counsel that he "was probably going to arrange it for the defendant regardless of whether there was a minute order from the court, but that it would help him tremendously if there was a minute order indicating that the Court preferred . . . special transportation." (1979 RT 678). The trial court concurred with the Sheriff's Department's request and issued an order providing special transportation for petitioner.

The jail-court liaison did not indicate that the judge's orders would likely be unenforceable. To the contrary, he suggested that providing the transportation would be more easily effected if an order was issued.

11. The trial court in the second trial failed to renew the order or ensure compliance with the prior order requiring separate transportation. Although the order was never rescinded, it was still necessary to be reordered. The trial judge also knew that the transportation arrangements were improper and that the snitches could not be trusted. The trial court stated that: "Cornejo has been examined to determine his involvement in the snitch industry. It seems to me that to say that, 'Well, on the bus he then told me this, that, and the other thing, strains credulity beyond belief.'" (RT 76). Nonetheless, both the failure to issue a separate housing order and separate transportation order provided the four snitches the opportunity to manufacture false testimony. The error was exacerbated by the trial court's failure to exclude Cornejo's testimony at the suppression hearing and the court's admission of that testimony at trial.

12. The commissioner said that Cornejo's testimony "strained credulity," when he held that the confession was admissible after Cornejo testified at the admissibility hearing. When trial counsel filed a motion to have the jailhouse informant testimony surpressed, the court deferred the motion until the prosecution was prepared to call the informants as witnesses during trial. (RT 371). The threat of having Anthony Cornejo, an adverse witness who was already allowed to testify at the §402 hearing, or one of the other three snitches testify, hampered trial counsel's ability to attack the validity of the confession as he otherwise would have, knowing that the threat of that perjured testimony hung over his head.

13. Cornejo's testimony was a direct result of the commissioner's refusal to issue an order providing separate transportation. It resulted in false testimony in violation of petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

CLAIM 36: The Trial Court Committed Constitutional Error In Considering Jailhouse Snitch Anthony Cornejo's Testimony During the Hearing.

1. Known jailhouse snitch Anthony Corenjo testified at an admissibility hearing regarding petitioner's purported confession to him. He claimed that he had been incarcerated in LA County Jail for 11 months and that he came to court on July 17, 1986. He sat near petitioner because they were both in the cage designated for special handling inmates. According to Cornejo, petitioner said he was involved in a case of 3 murders which had just been reversed. Petitioner said he had to lie to his attorneys about statements being coerced, although the statements were made freely. (RT 993-996).

2. Cornejo's testimony was perjured. See Claim 9. The use of Cornejo's perjured testimony renders petitioner's conviction illegal under *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667, 678-680 (1985). A conviction "obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have effected the judgment of the jury." *Id.*

3. The use of Cornejo's perjured testimony in securing petitioner's conviction, even if done in good faith, was fundamentally unfair. *United States v. Young*, 17 F.3d 1201, 1203-1204 (9th Cir. 1994) (defendant entitled to new trial whether or not prosecutor knew testimony was false). Even if the prosecutor had no knowledge of Cornejo's perjury, petitioner's conviction still could not stand because there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See, United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989) (quoting *Bagley.*)

4. The commissioner was entitled to know that Cornejo expected, and had previously received, beneficial treatment in exchange for his cooperation against petitioner. *See, Pyle v. Kansas*, 317 U.S. 213 (1942); *Giglio v. United States*, 405 U.S.

150 (1972) (co-conspirator's "credibility as a witness was . . . an important issue in the case, and evidence of any misunderstanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it").

5. A prosecutor's nondisclosure of benefits given to a witness in exchange for his testimony is a violation of due process and fair trial rights if the undisclosed evidence was material. *Singh v. Prunty,* 142 F. 3d 1157 (9th Cir. 1998) (citing *United States v. Bagley* at 678). Evidence is material if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. The reasonable probability standard is met when the evidentiary suppression "undermines confidence in the outcome of the trial." *Singh v. Prunty,* (quoting *Kyles v. Whitley,* 514 U.S. 419, 434 (1995).

6. Petitioner's conviction warrants reversal because the commissioner was led to believe that Cornejo had received no promise of leniency for his testimony. *See Napue v. Illinois*, 360 U.S. 264 (1959) (conviction reversed because prosecution witness falsely testified he had not received promise of leniency in exchange for his testimony and because prosecutor failed to correct the false testimony).

7. A conviction obtained by the state's knowing use of false testimony is illegal, even if the false testimony goes only to the credibility of the witness. *Id.* The "truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." *Id.* at 269-270; *see also Giglio v. United States*, at 154 (failure to disclose to defendant promise made to key witness that he would not be prosecuted if he testified violates due process); *Brown v. Wainwright*, 785 F.2d 1457, 1464-1465 (11th Cir. 1986)

("The thrust of *Giglio* and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving false testimony . . .[which] could . . . in any reasonable likelihood have affected the judgment of the jury.").

8. Had the commissioner known of the promises made to Cornejo, it would have been able to properly weigh his credibility without the resultant prejudice to petitioner. Had the commissioner known about the benefits conferred to Cornejo for his testimony, his ruling and the judgment would have been different. As a result, petitioner's conviction and sentence violate the due process clauses of the Fifth and Fourteenth Amendments, as well as his Eighth Amendment right to reliable sentencing.

CLAIM 37: The Trial Court Erred in Admitting Evidence from Jailhouse Snitch Anthony Cornejo.

1. Anthony Cornejo was acting as a government agent when he allegedly elicited incriminatory statements from petitioner. Cornejo's testimony was the product of an illegal interrogation by an undercover police informant who was placed in petitioner's proximity in contravention of well-established policy and with instructions to deliberately obtain such evidence. The government failed to disclose this evidence to the defense.

2. Cornejo's interrogation of Reno violated petitioner's Sixth Amendment right to counsel. Under *Massiah v. United States*, 377 U.S. 201 (1964), the Sixth Amendment right to counsel is violated when the government places an undercover informant in proximity to a defendant who is represented by counsel on pending charges, in a way that creates a likelihood that the informant will elicit incriminating statements. Such a likelihood is created, for example, by encouraging the informant to develop a relationship of trust and confidence with the defendant on the understanding that the informant will be paid for any incriminating information he purports to elicit. *United States v. Henry*, 447 U.S. 264 (1980). Such a violation requires that any evidence obtained by the informant be

excluded from the defendant's trial. *Massiah v. United States.*

3. Cornejo acted as an undercover police informant who, for benefits supplied by the government, was deliberately transported with petitioner under instruction to deliberately elicit incriminating evidence in violation of the rule of *Massiah.* It is also clear that the government failed to disclose the factual basis of the *Massiah* claim to the defense and further kept the defense in the dark by allowing Cornejo to lie about the circumstances of his testimony.

4. Statements obtained by a jailhouse informant are taken by interrogation. The right to counsel is violated where the informant "took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986); *United States v. Henry*, at 270 . "There is a distinct difference between passively receiving information provided by enterprising inmates and striking deals with inmates – whether based on coercion or enticement – to gather as much information as possible from other inmates . . . ." *United States v. York*, 933 F.2d 1348, 1357 (7th Cir. 1991).

5. A constitutional violation may occur even if there is no formalized agreement with an informant. Governmental agreements to reward an informant for his services need not be "explicit or formal, and are often inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct, over a sustained period of time." *Id.* citation omitted.

6. Under *Henry*, the government deliberately elicits statements when: (1) the informant acted under instructions as a paid informant for the government; (2) the informant appeared to be just another inmate; and (3) the defendant was in custody at the time the informant engaged him in conversation. *Id.* An informant need not have received monetary compensation to be considered a "paid informant." *See United States v. Brink*, 39 F.3d 419, 423 n. 5 (3rd Cir. 1994) ("any informant who is offered money, benefits,

preferential treatment, or some future consideration, including, but not limited to a reduction in sentence, in exchange for eliciting information is a paid informant").

7. Contrary to Cornejo's testimony, at the time the government placed him in petitioner's proximity, he had a long history as an undercover police agent. He was granted substantial benefits by the government in consideration for his obtaining incriminating evidence against petitioner, which was also contrary to his testimony. Cornejo had a pattern of allegedly obtaining incriminating evidence under instructions from the government and actively sought to elicit such information in petitioner's case. Cornejo's testimony against petitioner was the product of his deliberate placement in petitioner's proximity with instructions to obtain incriminating evidence in exchange for benefits.

8. Pursuant to *Henry*, Cornejo appeared to be just another inmate and petitioner was incarcerated when his statements were elicited.

9. Petitioner's Sixth Amendment rights had attached at the time of Cornejo's purported conversation.

10. The conversation to which Cornejo testified occurred at the time that petitioner was incarcerated for the very crime about which Cornejo testified. *Kirby v. Illinois*, 406 U.S. 682 (1972) .

11. Cornejo's testimony violated petitioner's Fifth Amendment rights as well. Where evidence of a defendant's incriminating statements is sought to be admitted, the government must prove that the statements were voluntarily given. Statements elicited by a government agent without a prior *Miranda* warning are involuntary and therefore inadmissible.

12. No *Miranda* warnings were given to Mr. Reno.

13. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court precluded the introduction into evidence of statements made to government agents pursuant to custodial interrogation unless preceded by a knowing, voluntary waiver of constitutional

rights. Here, Mr. Reno was in custody and, given the incentives provided to Cornejo, his active attempts to obtain incriminating information about Mr. Reno's case and his pattern and practice of allegedly obtaining such information in exchange for benefits from prosecutors, demonstrates that constitutionally prohibited interrogation occurred.

14. In addition, the introduction of Cornejo's testimony violated petitioner's due process right to fair trial on guilt and penalty and his rights under the Eighth and Fourteenth Amendments to present mitigating evidence and to a reliable determination of the appropriateness of the death penalty. The Eighth Amendment requires heightened reliability in the process by which a decision is made to sentence a defendant to death. *Woodson v. North Carolina*, 482 U.S. 280, 305 (1976) . This evidence deprived petitioner of a trial on guilt and special circumstances incorporating "that fundamental fairness essential to the very concept of justice" *Kealohapaule v. Shimada*, 800 F.2d 1463, 1465 (9th Cir. 1986), unfairly impugned petitioner's testimony that the confessions were involuntary and ultimately resulted in a fundamentally unreliable decision on death as the appropriate penalty. *Johnson v. Mississippi* 486 U.S. 578 (1988) .

15. Petitioner's Sixth and Fourteenth Amendment rights to effective assistance of counsel and to cross-examine and confront adverse witnesses were also violated by the state's use of Cornejo's testimony and the introduction of his illegally obtained evidence. By making special arrangements to place Cornejo in petitioner's proximity with instructions to deliberately obtain incriminating evidence and by failing to disclose these circumstances to the defense, the state prevented petitioner's trial counsel from effectively cross-examining Cornejo. *Davis v. Alaska* 415 .S. 308 (1974), and thereby rendered counsel ineffective.

16. The evidence obtained in violation of petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights more likely than not affected the judge's decision on admissibility of the confessions, which then affected the jury's verdict and sentence. The

false evidence about Cornejo's past and the circumstances which generated his testimony was highly material to the trial court's ruling. Had petitioner been provided with the facts about Cornejo's placement during transport as a police agent, he could have made a meritorious motion to exclude the testimony in its entirety under *Massiah* and *Henry*.

17. The remedy for a *Massiah* violation is exclusion of the evidence tainted by the violation of the right to counsel. *United States v. Morrison*, 449 U.S. 361, 365 (1981). The use of Cornejo's illegally-obtained evidence at petitioner's capital trial offends the most fundamental rights guaranteed by the federal constitution.

18. To the extent that trial counsel failed to adequately challenge the admission of this evidence, counsel rendered ineffective assistance of counsel.

2. GUILT PHASE.

CLAIM 38: The Trial Court Denied Petitioner his Right of Cross-Examination and to Present a Defense.

1. The prosecution presented Mary Ella Fowler, Scott Fowler's mother, as a witness.

2. On cross-examination, Mrs. Fowler revealed that Scott had many "older" friends. Defense counsel, however, was precluded from asking Mrs. Fowler the age of these "older" friends. (RT 2354). This restriction was a denial of petitioner's constitutional right of confrontation, to meet the charges and to present a defense.

3. The prosecution's theory in this case was that petitioner befriended Scott Fowler on the night of the murders. With Mrs. Fowler's statement, and nothing more, the jury could infer that befriending Fowler would have been easy, since Fowler had "older" friends. Fowler was 12 years old and thus the term "older friends" could cover a broad range of individuals.

4. Mrs. Fowler testified on direct examination that Scott went to the park with Ralph Chavez on the night of the murders. The age of those friends and further questioning

may have tended to show that Fowler and Chavez met someone else at the park that evening. The cross-examination could have revealed that Scott's "older friends" included dangerous pedophiles, as was evident in the 400 pages of withheld discovery. (See Exhibit S-A).

5. Counsel should have been permitted further inquiry of Mrs. Fowler. The question was reasonably related to the scope of direct testimony. The clear purpose of the questions was to elicit background information about Fowler's "older" friends and contacts to show that they may have been responsible for the killings.

6. If counsel had been permitted to question Mrs. Fowler and she had revealed that most of Scott's "older" friends were 16, then doubt would be cast on the proposition that Fowler spoke with petitioner. Additionally, probing into this area would almost undoubtedly have revealed other persons whom Fowler may have met on the night of the murders.

7. The critical role of cross-examination forms one of the basic tenets of criminal law. "Cross-examination of a witness is a matter of right," *Alford v. United States*, 282 U.S. 687 (1930) . The right of cross-examination is a "primary right" secured by the confrontation clause of the Sixth Amendment. *Douglas v. Alabama*, 380 U.S. 415, 418 (1964). The *Alford* court addressed the denial of cross-examination for impeachment purposes, but the scope of cross-examination is broad, regardless of whether the witness is being questioned for bias or to affirmatively support a defense theory. *Olden v. Kentucky*, 488 U.S. 227 (1988). Either way, counsel may not be sure of what will be elicited but the impact on guilt or innocence by that which is ultimately divulged may be great.

8. Similarly, the right to confront the charges and the right to present a defense are bedrock constitutional guarantees which are implicated here by the court's erroneous refusal to allow cross-examination of Ms. Fowler.

9. Petitioner was prejudiced by the denial of cross-examination of Mrs. Fowler in violation of the rights to confront the charges and to present a defense. Although her

testimony on direct was brief, she was potentially the bearer of more probative information to the identity of persons with whom Fowler and Chavez associated, and whether it was possible that her son would have so quickly befriended someone petitioner's age. (See, e.g., Exhibit S-A).

CLAIM 39: The Trial Court Erred in Failing to Take a Personal Waiver Under *Boykin-Tahl.*

1. Prior to the beginning of trial, petitioner sought to relieve his counsel in several *Marsden* hearings. Petitioner complained at a hearing right before trial that his attorney was planning to concede his guilt, over his specific objections, of the murder of Carl Carter, Jr. (Count III; RT 3/25/87 at 66). The trial court denied the request to remove counsel and refused to take further action in regard to petitioner's objection. During his opening statement, defense counsel, against the express directive of his client, conceded that Mr. Reno was guilty of second degree murder. (RT 2285). Counsel conceded guilt on this count in his closing argument to the jury as well. (RT 2796-2797). The prosecutor hammered on this concession in his rebuttal argument. (RT 2851).

2. This action by trial counsel was in effect the equivalent of a guilty plea to a murder charge and as such it required an on-the-record waiver of petitioner's rights as to this count. *See Boykin v. Alabama*, 395 U.S. 238 (1969) and *In re Tahl*, 1 Cal.3d 122 (1969).

3. Counsel's unauthorized concession of guilt was not within the attorney's range of strategic or tactical decision-making. Rather, such conduct constituted a violation of the duty of fidelity to counsel's client and deprived petitioner of his right to counsel.

4. This act of ineffective assistance constitutes a breakdown in the adversarial process protected by the Sixth Amendment and is therefore reversible *per se*. It is not subject to the prejudice analysis ordinarily required by *Strickland v. Washington*, 466 U.S. 668 (1984).

> Whatever trial strategy or tactics an attorney may employ in the defense of an accused he may not enter a plea of guilty to a felony without the consent of his client. Penal Code, section 1018. It is a violation of his duty of fidelity to his client to assume a position adverse or antagonistic to him without the latter's free and intelligent consent an attorney may not surrender any substantial right of the accused, [citation omitted] nor may he impair, compromise or destroy his client's cause of action.

People v. Davis, 48 Cal.2d at 256.

5. Counsel acted directly against the clearly stated directive of his client in making this concession in opening as well as closing statements. Counsel entered a guilty plea to second-degree murder without the consent and over the specific objection of petitioner, depriving petitioner of a jury trial on Count III.

6. This error was compounded by petitioner's clear, on the record objection to the admission during the *Marsden* hearing immediately preceding the trial and, thus, requires reversal of the guilt and penalty verdicts.

CLAIM 40: The Trial Court Erred in Admitting Prejudicial Cumulative Photographs of the Victims.

1. Many photographs of the victims were introduced into evidence, to which petitioner's counsel objected as being cumulative and prejudicial. Five photographs of Carl Carter, Jr. were admitted. (People's Exhibits 15A, B, C, F, 91; RT 2398, 2399-2401, 2414). The District Attorney argued that the photographs were necessary to show the cord around Carter's neck. (RT 2401, 2414). Defense counsel agreed to stipulate that a cord was depicted and further offered that there would be no contention that Carter died by any means other than strangulation by a cord. (RT 2401, 3142). The District Attorney argued it was necessary to show the cord because it helped to prove malice by means of showing pressure and force. (RT 3142). However, due to the advanced state of decomposition, it is possible that the bloating of the body contributed to the tightness of the cord and so the prosecutor's argument was misleading.

2. Four photographs of Scott Fowler were admitted (People's Exhibits 22A, B,

C, 52A) and three photographs of Ralph Chavez were admitted at trial (People's Exhibits 24A, B, 25B; RT 2416-2418). The photographs were cumulative and prejudicial.

3. Under state law, in order to admit homicide victim photographs "the trial judge had to determine the probative value of the photographs, contrasted with the danger of undue prejudice to the defendant." *People v. Boyd*, 95 Cal.App.3d 577, 589 (1979)

4. The trial court's rulings in this case were erroneous as the photographs provided no probative value to the contested point. The cause of death of the victims was never disputed and counsel even offered to stipulate to this issue. Additionally, the coroner's testimony was thorough concerning the cause of death and type of wounds. It was not necessary to illustrate the issue with numerous and wholly unnecessary photos, and was thus unconstitutional.

5. The photographs of Carter showed a state of advanced decomposition. There was no legitimate purpose served by the introduction of multiple photographs other than inflammation of the passion of the jury.

6. In this case, the trial court abused its discretion in admitting the photographs. "Unnecessary admission of gruesome photographs can deprive the defendant of a fair trial and compel reversal." *People v. Cavanaugh*, 44 Cal.2d 252, 268-269 (1955). Their introduction "supplied no more than a blatant appeal to the jury's emotions. [Its] prejudice-arousing affect heavily outweighed [its] probative value." *People v. Smith*, 33 Cal.App.3d 51, 69 (1973).

7. The photographs added to the highly inflammatory nature of the crimes - the murder of a child. They graphically showed the physical results of the crimes, yet proved nothing at issue. The only issue as to Carter was the degree of the offense, but the photographs did not aid in helping the jury to make that determination. The issue as to the 1976 murders was identity. While there was no physical evidence tying petitioner to those matters, the photographs served as physical evidence to inflame the jury.

8. After seeing the photographs, the jury felt compelled to convict someone. The extreme prejudice from the photographs cannot be doubted and therefore the convictions must be overturned.

9. Introduction of the photographs also violated petitioner's right to a fundamentally fair trial as guaranteed by the Fourteenth Amendment and to a reliable determination of guilt in a capital case as guaranteed by the Eighth Amendment. With regard to the latter, the error was particularly egregious in light of the trial court's instructions to the jury that it consider all guilt phase evidence in determining the penalty, even if it was unrelated to any specific statutory factor in aggravation or mitigation (CALJIC 8.84.1).

CLAIM 41: The Magazines and Photographs of Young Boys Were Improperly Admitted.

1. At trial, 15 photographs and 11 magazines with photographs were admitted into evidence. The photos and magazines depicted boys. At an admissibility hearing on the issue, Sgt. Carter testified that the photos and magazines had been found on petitioner's coffee table in a manila envelope and on shelves in the living room (RT 2452, 2453). Over defense objections, the court ruled that the photographs were admissible under Evidence Code § 1101(b) in order to show motive and intent. (RT 2457).

2. While only 15 photographs and 11 magazines were admitted, Officer Carter falsely testified in front of the jury that he found "literally hundreds of pictures, thousands." (RT 2463). Upon questioning by defense counsel, Carter stated that he did not have the "hundreds,

thousands" of pictures. Defense counsel requested that Carter's answer as to the number of pictures be stricken and the court stated that it would take the matter up later. RT 4642. The matter was not readdressed.

3. Prior to Officer Carter's testimony, the court read a limiting instruction to

the jury informing them that they could use the photographs to show characteristic method, plan or scheme in order to show intent and motive. (RT 2463). During the conference on instructions, the court again explained, out of the presence of the jury, its rationale for the admissibility of the evidence:

> It seems to me that the photographs and the magazines show a morbid interest in young boys. "It's extremely important to realize that those books and magazines do not deal with adults, they deal with children. I think that under any understanding is something that is an issue in this case. It goes to the defendant's motive and intent which is—which are issues in this case. It is not introduced for any other purposes.

(RT 2725).

4. The photographs were irrelevant to any legitimate issue in the case. Moreover, state law holds that: "Evidence of a person's character or a trait of his character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his conduct) is inadmissible when offered to prove his conduct on a specific occasion." Evidence Code § 1101(a).

5. Here, however, the court admitted evidence of petitioner's conduct, i.e., possession of photographs of young boys, in order to show petitioner's "morbid interest in young boys" as a link to somehow prove that petitioner was guilty of the charged crimes.

6. The photographs thus constituted inadmissible evidence of petitioner's disposition and the error was manifestly prejudicial.

7. "As a general rule, evidence that the defendant committed other crimes is inadmissible if offered solely to prove a criminal disposition on defendant's part." *People v. Thomas*, 20 Cal.3d 457, 464 (1978). As this Court has repeatedly explained, the purposes of the foregoing exclusionary rules are threefold: "(1) to avoid placing the accused in a position in which he must defend against uncharged offenses, (2) to guard against the probability that evidence of such uncharged acts would prejudice defendant in the minds of the jurors, and (3) to promote judicial efficiency by restricting proof of

extraneous crimes." *Ibid.*

8. Evidence Code § 1101(a) forbids character evidence to show a person's propensity to commit a crime. Subdivision (b) exempts from the bar against admissibility "evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than [a person's] disposition (b) goes on to list a number of familiar—but frequently misapplied—avenues of admissibility for otherwise inadmissible uncharged acts: "Motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

9. In *People v. Tassel*, 36 Cal.3d at 83, this Court "acknowledge[d] that our pronouncements in the area of `other crimes' evidence have not been entirely consistent." But *Tassel* pointed to *People v. Thompson*, 27 Cal.3d 303 as being helpful "to isolate and identify the various considerations which play a part in determining the admissibility of such evidence." *Tassel,* 36 Cal.3d at 84. Indeed, *Tassel* emphasized the point in *Thompson* "that the question of weighing probative value against prejudicial effect does not even arise, unless the disputed evidence is relevant to an ultimate fact `actually in dispute'" *ibid.* In *Thompson*, this Court stated:

> Evidence of an uncharged offense is usually sought to be admitted as "evidence that, if found to be true, proves a fact from which an inference of another fact may be drawn." [Citation.] as with other types of circumstantial evidence, its admissibility depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material facts; (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence. [Citations.]

27 Cal.3d at 315 (footnotes omitted, emphasis in original).

10. The photos here fail both the tendency and relevancy prongs of *Thompson*. At issue in this case was petitioner's identity as to the first two offenses and his intent as to the third. The court admitted the evidence as to the issues of intent and motive. Motive has been described as an "intermediate fact," and thus "not necessarily material" absent a

showing that it "tends logically and reasonably to prove an ultimate fact which is in dispute" *id.* at 315, fn. 14. The ultimate fact in dispute in this case was intent.

11. Mr. Reno's possession of photographs of nude boys, which violated no law, does not provide any motive as to any intent he may have had, other than, perhaps, to take photos of Carter. There is no logical connection between possession of the photographs and any inference of intent to commit murder or a violation of § 288.

12. In fact, the only way in which the jury could possibly have used this as evidence of motive was to infer that because petitioner possessed these photographs, he must have had, in the words of the court, a "morbid interest in young boys" and therefore he must have possessed the requisite intent needed for the crimes.

13. The court constitutionally erred in admitting the evidence under the guise that it was probative of motive. It was also an improper use of the motive exception to Evidence Code § 1101(a). Petitioner's possession of photos and magazines that were perfectly legal provides no basis for a motive for the charged crimes.

14. The court also admitted the evidence under the intent exception of Evidence Code § 1101(b). Even though intent was at issue as to the killing of Carter, the photos were improperly admitted because the jury had to infer from the evidence that because petitioner, an artist and photographer, possessed perfectly legal photos of young boys, he was some type of "deviant," and therefore he must have possessed the requisite intent to perpetrate a violation of Penal Code §§ 187 and 288. This reasoning is illogical and unsupported by any evidence. It is simply bad character evidence in its purest form. Such reasoning would in effect allow accusations of murder to be leveled at anyone in possession of such materials.

15. The possession of legal, non-sexual photographs of nude young boys is not evidence of whether petitioner had the requisite intent necessary for a conviction of the murder of Carter. It does not follow that anyone who possesses pictures of nude boys also

harbors the intent to kill young boys.

16. *Thompson* mandates that the court examine any rule or policy limiting the introduction of relevant evidence: "Even if evidence of other crimes is relevant under a theory of admissibility that does not rely on proving disposition, it can be highly prejudicial." *id.* at 813. In short, "Under Evidence Code section 253 the probative value of this evidence must outweigh the prejudicial effect." *ibid.* One leading commentator has explained:

> The significance of the *Thompson* case lies in its holding that, when evidence is offered that a defendant committed an offense other than for which he is on trial, its relevancy to prove some disputed fact on a theory in addition to its relevancy as character trait or propensity evidence—such as intent, motive, modus operandi—must be substantial on the theory tendered in order for the probative value of such evidence to be considered as outweighing the manifest danger of undue prejudice, to avoid exclusion under Evidence Code section 253, even though not barred by Evidence Code section 1101(b).

2 Jefferson, Cal. Evidence Bench Book (2d ed. 1982), § 33.6, p. 1211 (emphasis omitted).

17. Thus, even if the disputed evidence could have been admitted because it fell into a legitimate avenue of admissibility, the court would still have to engage in a balancing test. There is no evidence that the trial court engaged in such a test. Here, the disputed evidence was probative of petitioner's character, not intent, and as to any intent, its value would be severely outweighed by its prejudice. The material was highly inflammatory and could serve only to alarm the jury, which was considering charged crimes against children, rather than providing them with proper evidence for adjudicating the case fairly.

18. State law evidentiary errors, such as this, which render a trial fundamentally unfair violate the Due Process Clause of the Fourteenth Amendment. *Estelle v. McGuire*, 502 U.S. 62 (1991); *Jamal v. VanDeKamp*, 926 F.2d 918, 919 (9th Cir. 1991); and *Henry v. Estelle*, 399 F.2d 3241 (9th Cir. 1993).

19. In a capital case, such errors can also lead to the risk of an arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment,

particularly when, as in the present case, the jury was explicitly instructed to take into account all guilt phase evidence in deciding the penalty. CALJIC 8.84.1.

20. The introduction of this evidence was violative of petitioner's right to due process as guaranteed by the Fourteenth Amendment (*see McKinney v. Rees*, 939 F.2d 1378 (9th Cir. 1993); *Henry v. Estelle*, 993 F.2d 3241), as well as petitioner's rights under the Fifth and Eighth Amendments and constitutes an arbitrary denial of state law rights, in violation of due process. Mr. Reno's First Amendment rights were also violated by the use against him of the possession of otherwise legal magazines and photographs. cf. *Dawson v. Delaware*, 503 U.S.159 (1992).

CLAIM 42: Confining Defendant to a Marked Squad Car in Full Sight of the Jury While the Jury Viewed the Crime Scene Was a Deprivation of Petitioner's Fifth Amendment, Sixth and Fourteenth Amendment Rights.

1. Trial counsel requested that the jury be allowed to view the crime scene. (RT 2538). The court granted the motion. The view occurred on May 11, 1987. (RT 2539).

2. Pursuant to the court's order, 1) petitioner was transported in a black and white squad car; 2) waited in the vehicle shackled with leg and waist chains with officers present; and 3) with the car window left open. (RT 2547).

3. The trial court issued the restrictive order despite trial counsel's stated intention to take testimony at the scene. (RT 2545). Trial counsel objected to the shackling of petitioner. The court responded, without further hearing, that "Mr. Memro can complain all he wants." (RT 2548). While at the scene, petitioner could not hear what was said due to the distance between his car and the location of the jurors and court personnel.

4. A defendant has a right to be present at his own trial. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370 (1892). According to the Ninth Circuit Court of Appeals: "The rule includes the defendant's right

to be present whenever the court communicates with the jury." *Bustamante v. Eyman*, 456 F.2d 269 (1972) (citing *Shields v. United States*, 273 U.S. 583 (1927)).

5. In *Snyder v. Massachusetts*, 291 US 97, 107 (1934), the Supreme Court held that "a defendant has a right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."

6. Here, Mr. Reno's presence was necessary in order to view and hear the testimony evidence presented to the jury so that he could adequately participate in his defense. Mr. Reno was unable to hear any of what transpired because he was confined to the squad car at the jury view of the crime scene.

7. The trial court failed to consider any alternatives to the procedure, despite their availability. In *People v. Walther*, 263 Cal. App. 2d 310, 323, the defendant was transported on the bus with the jurors so that the defendants right to be present was preserved. The defendant was guarded and every effort was taken to ensure the safety of the jurors.

8. The trial court's error was further exacerbated by the failure to transcribe the proceedings so that petitioner could read the transcript so objections could have been preserved for appeal. *See Bustamante v. Eyman*:

> Section 753(b) of the Court Reporter Act requires that a reporter "shall record verbatim by shorthand or by mechanical means . . . (1) all proceedings in criminal cases had in open court." 28 U.S.C. § 753(b). This rule is mandatory and supplants any inconsistent local court practice. *See United States v. Taylor*, 607 F.2d 153, 154 (5th Cir.1979).

United States v. Cashwell, 950 F.2d 699 (1992). No transcript of the proceedings was made and defendant was left ignorant of the testimony given. Consequently appellate and habeas counsel were handicapped by this omission.

9. At the jury view, the defendant was confined in leg and waist chains and was kept in a black and white squad car apart from, but in full sight of, the jury.

10. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court emphasized that a defendant may be prejudiced if he appears before the jury bound and gagged. "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the court is seeking to uphold." *Id.*, at 344.

11. The underlying principle of these cases is that the jury will not be able to separate certain aspects of a defendant's character and the defendant's treatment by the court from its duty to determine the facts of the case before it. Factors implicating the defendant's character, behavior and treatment may affect the jurors in a particularly insidious manner:

> Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play," *Williams*, 425 U.S., at 505.

Holbrook v. Flynn, 475 U.S. at 568.

12. Not only was petitioner shackled, he was confined in a squad car away from, but not out of sight of, the jury. This separation brings about the same concerns for the dignity of the defendant, his presumption of innocence and his ability to communicate with his attorney that shackling presents. Despite the fact that the jury was supposed to presume the petitioner innocent, the image given to the jury was that petitioner was a threat who needed to be separated from civilization.

13. It is for this reason that the courts require that the less severe alternatives be considered. *See Holbrook v. Flynn*. The trial court failed to consider such alternatives.

14. Compelling a prisoner to wear prison clothes at trial violates his due process rights under the Fourteenth Amendment and his presumption of innocence. *Felts v. Estelle* 875 F. 2d 785 (1989). The Ninth Circuit explained: "Compelling a defendant to appear at trial in prison garb is impermissible because the constant reminder of the defendant's incarcerated status may affect jurors' perception of him or her as a wrongdoer." *United States v. Olvera* 30 F. 3d 1195 (1994).

15. Mr. Reno's confinement to a black and white squad car left little doubt in the minds of any observer, that he was a wrongdoer who required security, confinement and isolation or separation. Confining petitioner to a squad car showed that petitioner was guilty, without him having been found so.

16. Trial counsel failed to object to the confinement of petitioner to the police car. Trial counsel failed to ensure that petitioner was able to hear what transpired during testimony at the view. There were no tactical reasons for counsel to not object. Failure to do so constituted ineffective assistance of counsel under *Strickland v. Washington* 466 U.S. 668 (1984) and denied petitioner a fair trial.

17. Similarly, appellate counsel was constitutionally ineffective for failing to raise these claims on appeal. *Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985)*; see also Coleman v. Thompson*, 501 U.S. 722, 755 (1991). To the extent that any claims included in the petition could have been brought by prior state counsel, prior counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment by not bringing those claims. To the extent that the claims were available, it was constitutionally ineffective assistance of counsel not to bring these claims during prior proceedings. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error if that error . . . is sufficiently egregious and prejudicial."). Petitioner should not be penalized for appointed counsel's ineffective assistance, especially in light of petitioner's

many attempts to have him removed from his representation. Had counsel rendered effective assistance, the claims could have and would have been brought in the first instance.

CLAIM 43: Shackling Petitioner in Court Deprived Him of His Fifth, Sixth, Eighth and Fourteenth Amendment Rights.

1. On Jan. 9, 1987, the court observed that petitioner was shackled in court. (RT 60). The court noted that the shackling was in direct contravention of his order.

2. On June 3, 1987, petitioner was again shackled while in court. (RT 2893-6).

3. On June 8, 1987, petitioner was again shackled while in court. (RT 2926).

4. Mr. Reno's visible shackling violated his rights to due process, to an impartial jury and to a reliable determination of guilt and sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments.

5. The constitutional guarantee of a fair trial includes the assurance that a defendant in a criminal action shall come before the jury clothed with a presumption of innocence, and that presumption may only be dislodged by a finding beyond a reasonable doubt, based on competent evidence presented at the defendant's trial, that the defendant is guilty of the offense or offenses charged. *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

6. The visible shackling of the accused is inherently prejudicial. *Holbrook v. Flynn*, 475 U.S. 560, 568-569 (1986); *Elledge v. Dugger*, 823 F.2d 1439, 1451, mod., 833 F.2d 250 (11th Cir. 1987), *cert. den.*, 458 U.S. 1014 (1988). Chains, like prison garments, are unmistakable indications of the need to separate a defendant from the community at large. *Holbrook*, 475 U.S. at 569. They are to be used only as a last resort (*Spain v. Rushen*, 883 F.2d 712, 728 (9th Cir. 1989), *cert.den.*, 495 U.S. 910 (1990)), and only where necessary to serve an essential state interest specific to a particular trial. *Kennedy v. Cardwell*, 487 F.2d 101, 111 (6th Cir. 1973), *cert. den.* 416 U.S. 959 (1974). Because of the fundamental interests at stake, any decision to employ visible restraints is

subject to "close judicial scrutiny" on review. *Estelle*, 425 U.S. at 504.

7. Shackling also offends the confrontation clause. *Illinois v. Allen,* 397 U.S. 337, 344 (1970). The *Allen* court identified three wrongs in shackling: A juror may be prejudiced against a defendant after seeing him shackled; shackles may confuse and embarrass the defendant, thereby impairing his mental faculties; and they may cause him pain.

8. *Spain v. Rushen*, 883 F.2d 712, 726 (9th Cir. 1989), further discussed problems which arise from shackling:

(1) Physical restraints may cause jury prejudice, reversing the presumption of innocence;

(2) Shackles may impair the defendant's faculties;

(3) Physical restraints may impede the communication between the defendant and his lawyer;

(4) Shackles may detract from the dignity and decorum of the judicial proceedings; and

(5) Physical restraints may be painful to the defendant.

9. The Ninth Circuit has also recognized that shackling is extremely prejudicial in a weak case where the evidence is not overwhelming. *Dyas v. Poole*, 309 F.3d 586, 588 (9th Cir. 2002). In *Dyas*, the defendant was forced to wear leg shackles in the courtroom and was shackled while being led to and from the courtroom during her trial for first degree murder and robbery. The trial judge, in denying the defense request to prohibit shackling, stated that he did not believe that the leg shackles would be "'so visible that they come to the attention of the jury at all unless it's brought to their attention' and that the nature of the case was such that he preferred the defendants to wear leg restraints." *Dyas*, 309 F.3d at 587.

10. The district court in *Dyas* held an evidentiary hearing and the defense

presented "[t]hree jurors, one prospective juror who had been excused, members of Dyas's defense team, and Dyas. . . One of the jurors and the prospective juror had been able to see Dyas's shackles from the jury box. Another juror recalled seeing Dyas in shackles in the hallway outside the courtroom. Dyas testified that the shackles caused her pain and inhibited her communication with her attorney, although she had not complained of these problems during the trial. The magistrate judge recommended that the district court grant a writ of habeas corpus, finding that there was prejudice because at least one juror was able to see the shackles and the evidence was not overwhelming. The district court adopted the recommendation and granted the writ." *Dyas*, 309 F.3d at 588.

11. In affirming the District Court's habeas relief, the Ninth Circuit held:

> When a defendant has been unconstitutionally shackled, the court must determine whether the defendant was prejudiced. *See Ghent v. Woodford*, 279 F.3d 1121, 1132 (9th Cir. 2002). Our conclusion that Dyas was prejudiced is virtually compelled by our decision in *Rhoden v. Rowland*, 172 F.3d 633 (9th Cir. 1999). There we pointed out that shackling during trial carries a high risk of prejudice because it indicates that the court believes there is a "need to separate the defendant from the community at large, creating an inherent danger that a jury may form the impression that the defendant is dangerous or untrustworthy." *Rhoden*, 172 F.3d at 636 (citing *Holbrook v. Flynn*, 475 U.S. 560, 568-69, 89 L. Ed. 2d 525, 106 S. Ct. 1340 (1986)). Prejudice is particularly likely here because at least one juror saw Dyas's shackles during the trial from the jury box. *Id.* ("When the defendant's erroneous shackling has been visible to the jurors in the courtroom, we have found the shackling warranted habeas relief."). It is likely that other jurors saw the shackles, but if even one juror is biased by the sight of the shackles, prejudice can result. *See Parker v. Gladden*, 385 U.S. 363, 366, 17 L. Ed. 2d 420, 87 S. Ct. 468 (1966) (a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors").
>
> Two other factors increased the risk that Dyas was prejudiced by the juror or jurors having seen the shackles. Dyas was charged with a violent crime, increasing the risk that "the shackles essentially branded [her] as having a violent nature." *Rhoden*, 172 F.3d at 637. Moreover, the evidence against Dyas was not overwhelming, a fact reflected in the length of the jury's deliberations. Because the case was close, an otherwise marginal bias created by the shackles may have played a significant role in the jury's decision. *Id.*

Dyas, 309 F.3d at 588.

12. In *Duckett v. Godinez,* 67 F.3d 734 (9th Cir. 1995), the Court concluded that "it is a denial of due process if a trial court orders a defendant shackled without first

engaging in a two-step process. First, the court must be persuaded by compelling circumstances 'that some measure [is] needed to maintain security of the courtroom.' Second, the court must 'pursue less restrictive alternatives for imposing physical restraints.'" *Id.* (citations omitted); *see also, United States v. Baker*, 10 F.3d 1374, 1401 (9th Cir. 1993).

13. Due process requires the trial court to engage in an analysis of the security risks posed by the defendant and to consider less restrictive alternatives before permitting a defendant to be restrained. *See Stewart v. Corbin*, 850 F.2d at 497-98. Here, the trial court ordered that petitioner be unshackled in court but the sheriff continued to violate the order and petitioner's constitutional rights.

14. As identified in *Spain v. Rushen*, shackling a defendant can make communication with counsel difficult thus violating the Sixth Amendment. *Strickland v. Washington*. Implicit in that guarantee is the right to communicate with counsel, which in this case was violated by petitioner's continued shackling and the resulting mental strain that it caused. The court failed to take necessary steps to alleviate these difficulties. The result was that petitioner's rights to effective assistance of counsel, due process, a fair trial and heightened capital case reliability were violated.

CLAIM 44: Petitioner's Due Process Rights Were Violated When the Trial Court Admitted Character Evidence and Instructed the Jury to Consider It.

1. The prosecution sought to have numerous photographs and magazines admitted into evidence. (RT 2457). The photos had been seized from defendant's home one week after the Carter homicide. Some of the images depicted nude boys and men. The court admitted some of the images into evidence on the theory that the pictures showed a "characteristic method, plan or scheme in the commission of criminal acts similar to the method plan or scheme used in the commission of the offense in this case which would tend to show the existence of the intent." (RT 2463). There was no evidence that any of

the images were used in any way to entice Carter. And, absolutely no connection was made between the photos and the 1976 killings.

2. The pictures were highly prejudicial and were admitted for no legitimate purpose. The images highlighted the fact that petitioner was homosexual and portrayed him as a "pervert." Admitting the evidence was error and the "limiting" instruction given exacerbated the prejudice.

3. Under California Evidence Code Section 1101, bad character evidence may not be introduced to show a proclivity or tendency to commit crimes. The introduction of impermissible character evidence is a violation of a state statute but can also rise to the level of a constitutional Due Process violation: "state procedural and evidentiary rules may countenance processes that do not comport with fundamental fairness. [Citations omitted] The issue for us, always, is whether the state proceedings satisfied due process." *Jammal v. Van de Kamp*, 926 F.2d 918 (9th Cir. 1991). Prejudice, injected in a trial, can taint the trial to the point where a petitioner is fundamentally deprived of a fair trial. *Kealohapauole v. Shimoda*, 800 F.2d 1463 (9th Cir. 1986); *see also Engle v. Issac*, 456 U.S. 107 (1982).

4. It is improper to convict a defendant and sentence him to death based on irrelevant evidence concerning his interests and beliefs. It violates a defendant's Fourteenth Amendment rights to do so. *See, e.g., Dawson v. Delaware*, 503 U.S. 159 (1993). Here, the photos of boys introduced against petitioner was highly prejudicial and irrelevant to the charges. The admission of the nude photographs and magazines rendered petitioner's trial unfair and constituted a Due Process violation because the jury was prejudiced to the point where it "tainted the fundamental fairness of his trial." *Guam v. Shymanovitz*, 157 F.3d 1154 (9th Cir. 1998); *see also Cohn v. Papke* 655 F.2d 191 (9th Cir. 1981). .

5. This Court has held that:

> in order to be relevant as a common design or plan, evidence of uncharged misconduct must demonstrate not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. *People v. Ewoldt* (1994) 7 Cal. 4th 380, 402, 867 P.2d 757.

People v. Catlin, 26 Cal. 4th 81 (2001). None of the photographs depicted acts of violence. Most of the pictures were not sexually graphic in any way, depicting only nude males.

6. The trial court confirmed that this evidence had no direct relationship with the case: "It goes to the defendant's motive and intent which is -- Which are issues in this case . . . There is nothing to support a position that Carl Carter was aware of them, saw them, I agree with that. That is not the point." (RT 2725).

7. There was no evidence that Reno had used the photographs as part of a scheme, or for any particular purpose whatsoever. The only "motive or intent" which could be found from the photos was that petitioner may have had "perverted" interests. The trial court's argument amounted to finding that, based on the pictures, defendant was a pervert, so he likely acted like a pervert with Carter. The rules prohibiting character evidence as propensity evidence were designed to prevent just such arguments.

8. Independently, the court did not balance the prejudicial effect that photographs depicting nude boys would have on the jury against its negligible probative value. The trial court summarily rejected counsel's objection and admitted the evidence based on the theory that "It seems to me that the photographs and the magazines show a morbid interest in young boys." (RT 2725).

9. The "morbid interest in young boys" is not a required element to prove in a criminal case. It made no logical or legal sense to admit it. Perplexingly, the trial judge said:

> Jesus, why can't they be girls? Jesus.
>
> Are you taking this down as we're talking? You didn't put that why can't they be

girls, did you?

Then the court said:

> The record should reflect we're in chambers. Mr. Memro's not present. It's just the three attorneys.
>
> Mr. Millett has brought in all of the photographic material that was referred to by Deputy Carter plus nine magazines and one book which are all homosexual material involving, it appears, men only.

(RT 2439).

10. The prosecutor compounded the prejudice of petitioner's sexual orientation in his closing argument. Mocking petitioner as if he were musing before killing the victims, he said: "Well, let's see. If I kill this young boy, what will happen? They'll probably send me to prison, but that won't be so bad. They'll feed me and take care of me, and it will be a lot of security. And since I don't like – I have no interest in women anyway, that part of it won't be so bad." (RT 2786). These remarks implied that petitioner should not be sent to prison because, due to his homosexuality, he would enjoy it. This argument was particularly improper, since in the guilt phase, the prosecutor should not have commented on potential sentences or punishment.

11. Courts recognize that photos aimed at male homosexuals are highly prejudicial in nature.

12. In *Guam v. Shymanovitz,* 157 F.3d 1159 (9th Cir. 1995), the prosecution introduced magazines depicting homosexual pornography to show intent to molest minors and to prove that the defendant knew that molestation was illegal. The Court found the prosecution arguments implausible.

> The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401. This circuit has never held otherwise. . . . neither the defendant's possession of the . . . magazines, nor of any of the articles contained therein, was probative of whether the touching of the alleged victims' genitals was intentional or whether the touching actually was or could be construed as being for sexual purposes. At the very most,

> Shymanovitz's possession of the sexually-explicit magazines tended to show that he had an interest in looking at gay male pornography, reading gay male erotica, or perhaps even, reading erotic stories about men engaging in sex with underage boys, and *not* that he actually engaged in, or even had a propensity to engage in, any sexual *conduct* of any kind. In any event, propensity evidence is contrary to "the underlying premise of our criminal system, that the defendant must be tried for what he did, not who he is."

United States v. Vizcarra-Martinez, 66 F.3d 1006, 1014 (9th Cir. 1995) (internal citations omitted).

13. In *Vizcarra-Martinez*, the Ninth Circuit held that even if the literature was relevant, its probative value was heavily outweighed by its prejudice. The Court based its ruling on several decisions holding that pornographic material is *especially prejudicial if it is homosexual in nature. See United States v. Gillespie*, 852 F2d 475 (1988); *Cohn v. Papke*, 655 F.2d 191 (9th Cir. 1981); *United States v. Birrell*, 421 F.2d 665 (9th Cir. 1970). "The jury's inference that Shymanovitz was gay could in all likelihood have caused it also to infer that he deviated from traditional sexual norms in other ways, specifically that he engaged in illegal sexual conduct with minors." *Shymanovitz*, 157 F.3d 1159.

14. Prejudice is manifest when the homosexual material depicts "sexual activity that the jurors would perceive as deviant," which is "particularly prejudicial to a defendant accused of sexual misconduct or other related misconduct with minors." *Shymanovitz,* 157 F.3d at 1160.

15. The photographs and magazines depicting young boys and heightened the prejudice even further. The trial court remarked about the particularly prejudicial effect of the materials: "These are not photographs of grown men. These are not photographs of women. These are photographs of young boys. And I mean young." (RT 2459).

16. There was no evidence that the magazines and photographs existed at the time of the crimes, as the trial court confirmed. Thus, they could not be relevant to the question of intent. The Ninth Circuit has explained that possession of this material is not

sufficiently relevant and is unfairly prejudicial so as to prohibit its admission:

> Under the government's theory, the case against an accused child molester would be stronger if he owned a copy of Nabokov's *Lolita,* and any murder defendant would be unfortunate to have in his possession a collection of Agatha Christie mysteries or even James Bond stories. Woe, particularly, to the son accused of patricide or incest who has a copy of *Oedipus Rex* at his bedside.

Shymanovitz, at 1159.

17. Moreover, here the evidence was ancillary, unlike *Shymanovitz* and *Gillespie*, and thus its probative value was far less. The images were not relevant to the elements of the crime, but rather, presented impermissible character evidence to the jury. "There was a clear potential that the jury may have been unfairly influenced by whatever biases and stereotypes they might hold with regard to homosexuals" *Cohn*, 655 F.2d 191.

18. The trial court instructed the jury with a modified version of CALJIC 2.50. The court instructed:

> Certain books, magazines and photographs were received in evidence. Such evidence was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: The existence of the intent which is a necessary element of the crime of lewd act with a child. A motive for the commission of the crime charged. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case. You are not permitted to consider such evidence for any other purpose. You were so advised at the time that the items were offered in evidence.

19. The instruction itself was improper and if anything, served to alert the jury to the many ways in which they might consider petitioner's homosexuality. Further, possession of reading material does not qualify as a bad act. *Shymanovitz*, at 1159. The instructions inapplicability is evident from the trial court's manipulation by changing the caption from "evidence of other crimes" to "Certain books, magazines and photographs were received into evidence." (RT 2746).

20. In any event, as in *Gillespie*, the potential for prejudice in cases where

attention is drawn to the sexual orientation of the defendant is heightened to the point that curative instructions **do not** remedy the damage. *See also United States v. Merino-Balderrama* 146 F. 3d 758 (9th Cir. 1998). In *Merino-Balderrama*, the court found that a pornographic film was prejudicial and should have been excluded. The court held that a curative instruction was insufficient to limit the prejudice.

21. Moreover, admission of the evidence itself was error and CALJIC 2.50 did not cure the prejudice caused by the evidence. The instruction reminded the jury about the controversial material and suggested that they consider the evidence to determine the existence of intent or motive. Neither the court nor the prosecution was able to articulate any theory of admissibility involving intent or motive. Left without any legitimate use for the evidence, the jury was left with evidence of bad character in the form of a pile of highly prejudicial male homosexual pornography.

22. Insofar as trial counsel could have effectively objected to the admission of evidence or rebutted the court's theory of admissibility or otherwise objected, trial counsel failed to render effective assistance of counsel. *Strickland*, 466 U.S. 668.

23. To the extent that appellate counsel failed to raise the improper admission of evidence previously, appellate counsel rendered ineffective assistance of counsel. *Id.*

CLAIM 45: Allowing the Admission of the Magazines, Photographs and Books Violated Petitioner's Eighth and Fourteenth Amendment Rights.

1. Admitting the magazines, books and photographs illegally seized from petitioner's apartment and using it as bad character evidence contravened "the prohibition against convicting a defendant due to his status rather than his act." *Robinson v. California* 370 U.S. 660 (1962) (holding it to be cruel and unusual to punish a defendant for his drug addiction rather than his criminal act)*; see also People v. Fitch*, 55 Cal. App. 4th 172 (1997). Convicting petitioner based on his status violated petitioner's Eighth and Fourteenth Amendment rights.

2. This doctrine has been held to apply to both status crimes and to non-criminal conditions, such as mental illness and retardation. *Welsch v. Likins*, 373 F. Supp. 487 (1974). Applying the mental illness line of reasoning to specific mental illnesses, a defendant "could not, of course, be convicted merely of 'being a child molester'" even if he is charged with a specific act of molestation. *Hart v. Gomez*, 174 F.3d 1067 (9th Cir. 1999). The prosecutor must prove that the defendant committed the specific act for which he is charged, without resorting to propensity evidence to allow the jury to infer that because defendant is perceived as a "child molester" he therefore molested this specific child. *Hart* based its ruling on evidence which was not admitted that would have raised substantial doubt with the jury. Without the evidence, the jury convicted him on the perception that he was a child molester.

3. Petitioner's jury was allowed to consider character evidence painting him as a child molester. The photos featuring young boys served as an invitation to the jury to convict petitioner based on his mental disease, rather than the crimes for which he was charged. The evidence was presented and could only have been used by the jury to infer that because petitioner possessed images of nude children, he likely committed the crimes charged.

4. Introducing the nude photos focused the trial on his status rather than on his purported actions. The constitution forbids this method of prosecution.

CLAIM 46: The Trial Court Erred by Overruling Trial Counsel's Objection for a Failure to Comply with a Discovery Order by the Bell Gardens Police Department and for Allowing it to Be Introduced as Surprise Testimony, in Violation of Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment Rights.

1. During testimony at the 1987 trial, Officer Barclift testified for the prosecution that the Bell Gardens police never made mention to anyone outside law enforcement of the fact that a piece of the plastic container found at the scene had been cut in a specific manner. (RT 2504). Trial counsel never received this information as part of discovery or otherwise and objected to the testimony. (RT 2505).

2. The discovery order required the production of "any lists of items or evidence not released to the newspapers prior to defendant's arrest; any lists of any items not known to be available; and any other evidence or other reports which may be related to the above entitled case . . ." (RT 2514). The prosecution failed to turn over in discovery any of the police reports that mentioned the information about the plastic container in violation of the discovery order.

3. The defense was entitled to the information before trial rather than having it used as a surprise tactic during testimony. The court found: "First of all, it's already in the record. At this point in time to sustain an objection to me would be a moot act. Also, based upon the state of the record I don't see how it would in any way, shape or form be of any particular surprise or disaster to the defense." (RT 2507). The fact that the evidence was in the record had no bearing on whether it was a violation of the discovery order because it entered the record through Barclift's testimony.

4. This evidence amounted to an "unfair surprise" on trial counsel because counsel had not been provided any discovery that would have allowed counsel to prepare the defense for the testimony. This use of trial by ambush was a Due Process violation, depriving petitioner of a fair trial. One of the principal goals of discovery is to prevent "trial by ambush." *Brandon v. Mare-Bear, Inc.*, 2000 U.S. App. LEXIS 12585 (2000). Failure to disclose discovery which impacts the defense's ability to prepare or present its case constitutes unfair surprise. *United States v. Golyansky*, 281 F.3d 1330 (2002).

A defendant must have a meaningful opportunity to deny or explain the State's

> evidence used to procure a death sentence. *See Gardner v. Florida*, 430 U.S. 349, 362, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977).

Duvall v. Reynolds, 139 F.3d 768 (10th Cir. 1998). Trial counsel had no time to prepare to rebut the testimony given by Officer Barclift.

5. Trial counsel was entitled to an opportunity to rebut the assertion that only the Bell Gardens Police and the killer knew of the plastic bottle with the piece cut out. Such testimony was highly incriminating. The prosecution's theory was that only the killer knew of the cut bottle and that petitioner's description of cutting the bottle in his confession was proof of his guilt. The court denied counsel's objection, apparently under the theory that petitioner's guilt was so obvious that there was no harm in allowing the testimony:

> You have two separate confessions, given to two separate police agencies. You have one confession corroborated by the defendant taking the police to the scene of the crime and the police going to those locations where remnants or evidence of the crime have been secreted by the defendant and finding him in the exact location, So with this bit of evidence at this point to me is a – well, it's almost guilding [sic] the Lilly. It seems to me that at this point to raise it to the level of some kind of error is – it's not appropriate.

(RT 2507).

6. This analysis missed the point. The issue presented was whether a discovery violation took place. The quanta of other evidence was not relevant in determining whether the prosecution's failure to turn over this evidence was a discovery violation. The fact that other evidence existed implicating petitioner in the crimes made this violation more prejudicial. If this evidence was the only evidence implicating petitioner, it might have been easily contested. This evidence, in conjunction with other evidence, made a stronger case for guilt. This evidence needed to be rebutted and it could not be rebutted without adequate notice.

7. Trial counsel pointed out that there was "absolutely nothing to connect Mr. Memro to those murders [Fowler and Chavez] except his confession." (RT 2507). The

judge conflated the two crimes; petitioner never led the police to the site of the 1976 double homicide. This ruling is another reason why severance should have been granted because the evidence against petitioner was so thin regarding the 1976 double homicide. See Claim 26.

8. The strength of the evidence was immaterial to the objection. The court never considered the objection on its merits, instead deciding that the general evidence of petitioner's guilt was sufficient justification to overrule trial counsel's objection. After the objection was overruled, trial counsel asked for a mistrial. This too was denied. "Mr. Larkin: Is the court going to do nothing about the prior order or the officer's testimony? The Court: That's correct." (RT 2517).

9. When Officer Barclift was allowed to resume his testimony, trial counsel attempted to bring out the failure to comply with the discovery order on cross-examination. Trial counsel asked about the discovery order directing him to inform the defense about the bottle. The court sustained the prosecution's objection that "the order does not say that." Trial counsel asked if the order could be read into evidence. The trial court refused the request. (RT 2521).

10. These actions by the trial court further exacerbated the discovery violation. First, trial counsel was ambushed by undisclosed evidence because of the violation of the discovery order. Then, the court refused to allow counsel to inquire into the validity of that evidence. Denying petitioner the right to cross-examine a witness who testified against him on evidence presented in the testimony is a denial of petitioner's Constitutional right of Confrontation and Cross-examination. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *see also Kentucky v. Stincer*, 482 U.S. 730 (1987).

> A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the

> witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.

Davis v. Alaska, 415 U.S. 308, 315-316 (1974); *see also Olden v. Kentucky*, 488 U.S. 227 (1988). The trial court violated petitioner's right to confrontation and cross-examination.

11. The failure to provide discovery and to allow cross-examination violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

3. GUILT PHASE JURY INSTRUCTION CLAIMS.

CLAIM 47: The Court Erred in Failing to Give Defense Requested CALJIC 2.91.

1. At the conference on instructions, the defense requested CALJIC 2.91, which reads:

> The burden is on the State to prove beyond a reasonable doubt that the defendant is the person who committed the offense with which he is charged. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of defendant as the person who committed the offense before you may convict him. If, from the circumstances of the identification, you have a reasonable doubt whether defendant was the person who committed the offense, you must give the defendant the benefit of that doubt and find him not guilty.

2. In denying that request, the court responded, "There has been nobody identifying the defendant as the person who committed the crime and, therefore, to me, to this court, it is not even applicable." (RT 2671).

3. It was error for the court not to give the instruction. While no one pointed to petitioner and said "that's him," there was identification evidence and documentation concerning photographs.

4. Jose Feliciano who had been in the park on the evening of the murders of Fowler and Chavez, identified various photos of suspects as persons who were in the park that evening. The photos depicted persons other than petitioner. He also identified in court a photo of petitioner as looking like one of the people he saw.

5. During argument, the prosecutor commented on the identification.

> There is some significance apparently attached to the fact that Jose Feliciano has identified some other people. Now— when counsel makes reference to the fact that if we had more pictures we could show you. More presumably, if he had an opportunity to look at a few more people.
>
> Well, he has identified five. At one time or another I believe he's identified these two people who, incidentally, other than have long hair, beards and mustaches, I think you'll agree don't look anything alike. He's identified them as the presumably the person in the composite, and he has identified these three people presumably as the other person. And in court he says this looks a lot like that person that he described as the not being the long haired bearded person but the darker Mexican type person. And that's Mr. Memro.
>
> Now, there is a rather striking similarity in a general sort of way to all these people. Eddie Ledlow, Richard Lathrop, John Arnett and Harold Memro.
>
> Let's also consider the facts and circumstances of this so- called identification process. These young people are— they are young today, and they are really young when this happened. They are ten, eleven years old. And they are telling us what happened eleven years ago. An apparently somewhat inaccurate process. They were very young at the time, and I suppose it is a natural sort of thing that young people want to be helpful.
>
> Mr. Feliciano identifies five people as the two people he saw and that's pretty helpful. Scott Bushea claims that he never got any closer to any of these people than about from where the witness stand over to the end of the—end of the courtroom. I think we agreed that that was 38 to 40 feet. I believe everybody has indicated that it was dark. So nobody got too close other than, I believe, Jose Feliciano, who got up and talked to someone. That's my recollection of the testimony of the young people.
>
> And contrary to what Mr. Larkin states, there was one person in the courtroom who said there was some similarity to Mr. Memro; and that was none other than Jose Feliciano, who got up close to these people. And he looked at this picture and he said, yeah, that was the one—that looked like one of them. And that's Mr. Memro.

(RT 2030-2832).[13] Thus, the prosecutor was arguing that petitioner had been identified by Feliciano.

6. This Court has held that:

> it is error to refuse to give an instruction requested by a defendant which directs attention to evidence from which a reasonable doubt of guilt could be engendered. [Citation.] This applies with equal force to a refusal to give a requested instruction which deals with identification in the context of a reasonable doubt. [Citation.]

People v. Hall, 28 Cal.3d 148, 158-159 (1980).

---

[13] The actual photo lineup had been "lost" by the prosecution and could not be shown to the jury.

7. The trial court rejected the instruction because it believed there was no positive identification of petitioner. However, the defense to the crimes charged in Counts I and II was identity and various persons testified to the suspects seen at the park and the resemblance or lack thereof to petitioner.

8. Additionally, the prosecutor, in his closing argument, clearly tried to mitigate the effects of the lack of a surefire identification. The gist of his argument was that Feliciano had identified persons bearing a resemblance to petitioner and so, perhaps, it was actually petitioner whom he saw that evening. The prosecution inferred that because the conditions surrounding the identification were not optimum, Feliciano may, in fact have identified other persons when in fact he saw petitioner.

9. This situation made the identity instruction crucial. The prosecutor asked the jury to infer that petitioner was the person at the scene, despite Feliciano's less than surefire identifications. The requested instruction, which properly states the law, would have informed the jury that it must be sure of the identification beyond a reasonable doubt. No link was made for the jurors between reasonable doubt and identification so as to help them determine whether the prosecution had met its burden of proof. Instead, the prosecutor's argument essentially told the jury not to be concerned with Feliciano's sketchy identification.

10. The court also failed to give petitioner's specially drafted instruction, which stated: "The identity of the perpetrator of each of the crimes charged in the information must be proved beyond a reasonable doubt." (CT 524). Identity was the central issue in Counts I and II, since there was no physical evidence whatsoever connecting petitioner to those crimes. In the absence of any instructions, the jury may well have been misled by the prosecutor's argument into believing that Feliciano's shaky identifications of persons who resembled petitioner proved that Feliciano actually saw petitioner at the scene that evening.

11. The trial court's error in failing to give the requested identity jury instruction

created an impermissible risk that the conviction and sentence of death were arbitrary and unreliable in violation of petitioner's due process rights under the Fifth, Sixth and Fourteenth Amendments.

CLAIM 48: The Court Erred in Failing to *Sua Sponte* Instruct on the Lesser Offenses Included Within the Felony Charge of Lewd Act with a Minor.

1. The court instructed the jury as to the elements of the offense of lewd act with a minor and its relation to the felony murder charged in Count III. (RT 2756). The instructions came from under former CALJIC 10.30. However, the court did not provide the jury with any instructions on the lesser charges included within the greater lewd-act offense. The lesser included offenses which should have been instructed on include misdemeanor child molest, based on the fact that the mere taking the boy to photograph him was not a lewd act (which was not a crime at the time), and contributing to the delinquency of a minor under Penal Code § 272. Failure to instruct fully as to these potential lesser offenses prejudiced petitioner by not providing the jury with the range of choices necessary to determine whether the conduct of petitioner was such that he should be eligible for imposition of the death penalty.

2. Under California law, the trial court has a *sua sponte* duty to instruct on necessarily included offenses when the evidence raises a question about the existence of the elements of the greater offense. *People v. Wickersham*, 32 Cal.3d 307 (1982). The facts presented to the jury created a clear question on whether all the elements of the lewd act felony had been proven.

3. The court, at the preliminary hearing, had dismissed a sodomy charge for lack of evidence and the prosecution never refiled that charge in superior court. The court at the first trial had found the felony-murder special circumstance based on the lewd act to be not true. At the retrial, the prosecution argued that the murder was a premeditated murder and that it was committed in the course of a lewd act. Had the prosecution charged the

underlying felony of lewd act with a minor, petitioner would have been entitled to the lesser included offense instructions. The fact that the prosecutor chose not to file a felony charge in the Information should not restrict the range of choices open to consideration by the jury.

4. The evidence presented to the jury showed only that (a) petitioner and Carter went to petitioner's home for the purpose of taking photographs, (b) Carter wanted to leave, and (c) petitioner choked him impulsively. The prosecutor argued that the lewd act might be the allegedly attempted act of intercourse even if done after death or the touching of the victim in the act of choking him. (RT 2846-2847).

5. The lack of explicit definitions of the potential lesser included offenses prevented the jury from considering the range of misdemeanor offenses that petitioner might have committed instead. Had the jury been instructed on such lesser included offenses and found that they more accurately fit the circumstances of what had occurred, **petitioner could not have been convicted of first-degree murder on a felony-murder theory and thus made eligible for the death penalty.**

6. A conclusion by the jury that any one of these offenses more properly fit petitioner's acts would have resulted in a non-death-eligible verdict. Thus, failure to define the range of conduct for the jury resulted in unreliable guilt and penalty verdicts in violation of the Eighth Amendment.

CLAIM 49: The Court Erred in Failing to Instruct Pursuant to CALJIC 17.01 that the Jury Must Unanimously Agree on the Act Constituting the Underlying Felony Charge.

1. Whenever several different acts might constitute a violation of a statute, the jury must be instructed that "all jurors must agree that he committed the same act." CALJIC 17.01. In regard to Count III, the prosecutor presented numerous acts, any one of which he argued may have constituted the underlying felony. For example, the prosecutor argued that the general touching of the victim during strangulation or the alleged attempted post-

mortem anal intercourse could each be the basis for a lewd act finding. (RT 2846-2847).

2. Because the prosecution relied on discrete acts to support its theory of the commission of the felony, petitioner was entitled to an instruction on the unanimity requirement in this context. The jury was erroneously told they could convict even if there was no unanimity that petitioner committed any one of the acts which may have been a predicate fact for proof of the felony.

3. The failure to provide this requested instruction requires reversal of Count III because the failure to require the unanimity of the jury created a risk of an arbitrary and capricious finding of guilt in a capital case in violation of the Eighth Amendment.

CLAIM 50: The Trial Court Committed Reversible Error By Failing To Instruct the Jury That Shackling Had No Bearing on the Determination of Guilt or Penalty.

1. As discussed in detail in Claim 37, petitioner was shackled and confined to a marked police car during the jury view of the Ford Park crime scene. Petitioner was isolated from the jury, unable to hear or see what transpired at the scene during the taking of testimony. He was separated from the jury and evidence by shackles, the squad car and distance.

2. The trial court committed constitutional error when it failed to instruct the jury to disregard petitioner's shackles and chains.

3. The trial court was required to "instruct the jury *sua sponte* that such restraints should have no bearing on the determination of the defendant's guilt." (*People v. Duran*, 16 Cal.3d 282, 291-292 (1976)). In *Duran*, this Court held:

> We believe that it is manifest that the shackling of a criminal defendant will prejudice him in the minds of the jurors. When a defendant is charged with any crime, and particularly if he is accused of a violent crime, ***his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged.*** *See Illinois v. Allen* (1970) 397 U.S. 337, 344.

Id. at 290; emphasis added.

4. Federal constitutional law mandates the giving of this instruction under the Fifth, Sixth, Eighth and Fourteenth Amendments. *See Illinois v. Allen,* 397 U.S. 337, 344 (1970).

5. The trial court's error deprived petitioner of the procedures designed to ensure the reliability of the evidence considered by the jury, depriving petitioner of due process of law and a fair trial. "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle v. Williams,* 425 U.S. 501, 503 (1976); *Irvin v. Dowd,* 366 U.S. 717, 722 (1961).

6. The trial court's error deprived petitioner of a state created liberty interest. Liberty interests are protected by the due process clause of the Fourteenth Amendment even when the liberty interest itself is a statutory creation of the state. *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

7. In *Hicks v. Oklahoma,* 447 U.S. 343, the Supreme Court held:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the [proper] exercise of its . . . discretion . . . and that liberty is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id., 447 U.S. at 346.

8. The failure to give the *Duran* instruction violated state and federal due process under the Fourteenth Amendment as well as the Eighth Amendment guarantee to heightened capital case reliability.

CLAIM 51: The Trial Judge Deprived Jurors of Their Fact Finding Role by Ordering Them to Presume That Petitioner's Purported Confession Was Voluntary, in Violation of Petitioner's Fifth Amendment, Sixth Amendment, Eighth Amendment and Fourteenth Amendment Rights.

1. During the prosecutor's direct examination of Officer Sims, the judge *sua sponte* commanded the jury:

> [Y]ou will take as a given fact that Mr. Memro was properly advised of his constitutional rights and that he waived them. I don't want any have [sic] you deciding thank [sic] you haven't heard all magic recitation and you're going to be now deciding whether he's been advised of his rights. That is a question that's decided by the court. So for your purposes you will assume he's been properly advised of his constitutional rights and that he's waived and given up those rights.

(RT 2378). This admonishment was not requested by either party. It was given by the trial court *sua sponte*.

2. Instructing the jury to presume that the *Miranda* warnings were validly given and that petitioner voluntarily waived them eliminated the jury's role as fact-finder. As a result of informing them of this "evidence," it led the jury to believe that the confession, which purportedly followed upon the alleged *Miranda* warnings, was also voluntary and therefore true, a fact vigorously denied by petitioner.

3. At trial, and now, petitioner alleged that his confession was false and that he was coerced by law enforcement. The police coercion, supported by evidence and witness testimony, would have cast doubt on the veracity of the alleged *Miranda* warnings and the confession. The jury was entitled to reject the confession as involuntary or otherwise inaccurate.

4. The jury is charged with determining the facts, based in large part on its assessment of the credibility of the witnesses. Trial counsel raised direct inconsistencies between the alleged confession and witness observations. Many more significant inconsistencies existed but were not raised before the jury. The jury was entitled to hear the evidence and determine whether the confession was involuntary and false.

5. The jury should have determined whether the officers were credible witnesses and were truthful in their account of the giving and alleged waiving of *Miranda* warnings and subsequent involuntary confession. Instructing the jury to accept that *Miranda* warnings were given and then waived by petitioner was erroneous. All of these considerations were taken from the jury and decided by the trial judge instead.

6. It is axiomatic that juries generally decide issues of fact, while the judge decides issues of law. Depriving the jury of its fact-finding role violated petitioner's Due Process and Sixth Amendment rights. *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994).

7. Juries are the constitutional tribunal provided for trying facts in courts of law. *Berry v. United States*, 312 U.S. 450 (1941); *Ring v. Arizona*, 536 U.S. 584 (2002). In "criminal jury cases the jury considers the facts and applies the law as given it by the court." *People v. Grana*, 1 Cal. 2d 565 (1934).

8. Making this factual determination instead of allowing the jury, invaded "the fact-finding function, which in a criminal case the law assigns to the jury." *Sandstrom v. Montana*, 442 U.S. 510 (1979) (citing *United States v. Gypsum Co.*, 438 U.S. 422, 446); *see also Carella v. California*, 491 U.S. 263 (1989).

9. Wisely, this Court long ago said that it is improper for a judge to "take away their exclusive right to weigh the evidence and determine the facts . . . the judge shall decide upon the law, and the jury upon the facts, and that the former shall not invade the province nor usurp the powers of the latter." This Court found: "The judge has no more right to control the opinion of the jury upon a matter of fact than the jury have to disregard the directions of the judge upon a matter of law." *People v. Chew Sing Wing*, 88 Cal. 268 (1891) (*citing People v. Ybarra*, 17 Cal. 171).

10. Here, the error was worse because the truthfulness of the purported confession was disputed. Eyewitness testimony contradicted the account of the murder as

described in the "confession." Some facts, like the length of the knife, the number of assailants present and the timing of events were irreconcilable. The truthfulness of the confession was squarely disputed before the jury.

11. Although the judge made a determination on voluntariness for purposes of admissibility, the jury was entitled to determine voluntariness and accuracy in deciding guilt. *People v. Lindsey*, 27 Cal. App. 3d 622 (1972). The jury was entitled to "disagree with the judge, find the confession involuntary, and ignore it." *Jackson v. Denno,* 378 US 368 (1964).

12. The instruction to the jury took away the defendant's right to have a jury decide issues of fact and determine if the confession was voluntary and accurate or involuntary and false. Refusing to allow the jury to determine whether the *Miranda* rights were properly given and subsequently waived deprived petitioner his right to a jury determination of the voluntariness of the confession, and constituted constitutional error.

CLAIM 52: The Trial Court's Improper Instruction to the Jury Amounted to Improper Vouching.

1. The trial court's instruction that petitioner's confession was voluntary injected improper vouching for the prosecution police officer witness. The instruction said that the judge had determined that the police officers were credible and truthful witnesses. However, that determination was one which the jury was required to decide.

2. Here, the witnesses were police officers and agents of the government. The appearance that the prestige of the government was behind these witnesses and supported their credibility was especially stark.

3. Vouching ordinarily occurs when a prosecutor improperly buttresses a witnesses testimony.

4. Usually, "improper vouching occurs when the prosecutor places the prestige of the government behind the witness by providing personal assurances of [the] witness's

veracity." (internal quotation marks omitted); *United States v. Kerr*, 981 F.2d 1050 (9th Cir. 1992) (citing *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980). Here, it was worse because the judge worked for the government. The effect was magnified since the purportedly "neutral" court was telling the jury what conclusion to reach. The trial court's comments indicated "that information not presented to the jury supports the witness's testimony" and constituted improper vouching. *Roberts v. California; see also United States v. Simtob*, 901 F.2d 799 (9th Cir. 1990).

5. The court's vouching prejudiced petitioner to the point where he was deprived of a fair trial, and constituted a Due Process violation. Reversal is warranted under the Fifth, Sixth, Eighth and Fourteenth Amendments. *See e.g. Washington v. Hofbauer*, 228 F.3d 689 (2000).

CLAIM 53: The Trial Court Erred in Failing to Instruct the Jury That Count I Was Charged as Second Degree by Law, Which Is the Maximum Charge the Facts Can Support.

1. Trial counsel filed a motion asking that the jury be instructed that the maximum degree for Count I could only be murder in the second degree. The motion was based on the trial court's verdict during the first trial in 1979 that the Fowler killing was second-degree murder.

2. The prosecution argued that if the judge instructed the jury that Fowler was second degree, it "may confuse the issues insofar as the Chavez murder is concerned." (RT 2224). Defense counsel observed that he had moved for severance, in part in order to avoid such confusion and the prosecution had vigorously opposed the motion. (RT 2224). The prosecution never clarified why analogizing the two murders would be improper. Nor did the government explain in what way the jury would be "confused."

3. When the court asked the prosecution to explain its position, the prosecutor said:

Well, I'm not sure that the verdicts objectively make a lot of sense from the

> first trial. And I'm not saying that to be critical or anything like that, I just think that that's a fact. And for the jurors to hear essentially two murders that are more or less identical as to counts 1 and 2 and to be told that count 1 is a second degree murder, I think is very prejudicial to the prosecution.

(RT 2222).

4. As a matter of law as applied to the facts, the court had determined that the Fowler killing was, at most, second-degree murder. Double jeopardy principles barred revisiting this determination, since the conviction of second-degree murder was in effect an acquittal of first-degree murder. *See, e.g., Sorola v. Texas*, 493 U.S. 1005 (1989); *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Brown* v. *Ohio*, 432 U.S. 161 (1977).

5. Second degree murder was the maximum charge that could be found, although the jury was entitled to find petitioner guilty of lesser included offenses or no offense at all. There would have been no error informing the jury that the Fowler killing was charged only as a second-degree murder. Such an instruction was accurate and would have aided the jury's understanding of the law applicable to these facts. Moreover, giving that instruction would have affected how counsel was able to proceed on the case generally and particularly in closing argument.

6. Petitioner was entitled to provide accurate instructions to the jury, particularly where doing so could render him ineligible for a death sentence. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154 (1994).

7. It violates due process if a defendant's jury is not accurately instructed on the law, or if as a result of instructions, the jury applies an incorrect legal standard. *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993).

8. If the jury found that petitioner was guilty of second degree murder in Count I, it was legitimate for them to relate that count to the other crimes and find second degree

murder at most. Drawing an analogy between two analogous murders was not confusing, as the prosecutor alleged. It was legitimate and logical and consistent with the behavior. Had the jury determined that the Fowler and Carter killings were analogous, the jury would have concluded that the Carter killing was at most second-degree murder and thus petitioner would have been ineligible for the death penalty.

9. Ultimately, the judge gave CALJIC 8.75 and instructed:

> Count 1 charges murder in the second degree as a matter of law. This is for reasons which do not concern your deliberations and about which you must not speculate.

(RT 2766). This instruction left the erroneous impression that Count I may have been limited to second-degree murder because of some legal technicality and not because of a prior factual determination. The instruction not to speculate prevented the jury from recognizing the factual basis for the second degree finding.

10. This instruction was prejudicial because it largely prohibited the jury from relating the facts of Count I to Count II, which were close in time. Scott Fowler was allegedly killed suddenly after making a derogatory comment about homosexuals which triggered a violent rage in the killer. Ralph Chavez was allegedly killed moments later when he was awakened by the commotion. The second murder could have been construed as a continuation of a first voluntary manslaughter heat of passion killing.

11. The instruction was particularly prejudicial when considered in conjunction with Count III. If the purported confession is believed, Carter was killed, like Fowler, in a sudden flash of anger after saying something that triggered a violent reaction. If the jury had been informed that, based on the facts, as opposed to a "matter of law," the Fowler killing was at most second degree murder, it is reasonably likely that the Carter killing would have dictated an identical result because of the similar circumstances.

12. A conviction of second-degree murder in Count III would have made petitioner ineligible for the death penalty. Only the Carter killing was committed after

California reinstated the death penalty.

13. Even if petitioner had been convicted of first-degree murder on Count III, a finding of second degree murder on Counts I and II would have been reasonably likely to lead to a sentence of life without parole. Thus, the failure to instruct adequately was prejudicial.

14. The instruction would have been accurate, would have assisted the jury, was not improper and should have been given. The failure to instruct accurately regarding Count I fundamentally tainted the guilt phase verdicts as well as the sentence.

CLAIM 54: Instructing the Jury Pursuant to CALJIC 8.31 Unconstitutionally Lessened the Prosecution's Burden of Proof.

1. The jury was instructed on second degree murder as a killing resulting from an act dangerous to life pursuant to CALJIC 8.31. (CT 492). This instruction stated:

> Murder of the second degree is also the unlawful killing of a human being as the direct causal result of an intentional act, involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with wanton disregard for human life, or the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for human life.
>
> When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being.

(CT 492).

2. The jury was also instructed on second-degree murder pursuant to CALJIC 8.30:

> Murder of the second degree is the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation.

(CT 491).

3. The jury convicted petitioner of second degree murder in Count I. The verdict form was a general verdict form, which did not ask under which theory of second-

degree murder the jury convicted petitioner. (CT 527). The jury was polled as to their verdict, but not polled on the theory under which petitioner was convicted. (RT 2884-86).

4. The prosecution's theory of the case was that the killer deliberately and intentionally killed the victim when the victim insulted homosexuals.

5. The trial court had previously recognized that this case was not one where mental state need be implied. The court explained when looking at malice instructions that this case was not an implied malice case. (RT 2676). It was either an intentional killing or an unintentional killing due to rage reaction, mental illness or some other reason diminishing petitioner's mental state.

6. The effect of the instruction was to remove a necessary element of the offense of second-degree murder. Pursuant to CALJIC 8.30, second-degree murder is an intentional killing without premeditation. If CALJIC 8.31 were interpreted broadly enough, it would render 8.30 superfluous. Under the broad reading used to give the instruction in this case, an act which, if done intentionally, would cause the death of a person, would necessarily also qualify as an act which the natural consequences of were dangerous to human life. This reading cannot be correct, as it renders an entire instruction, CALJIC 8.31, meaningless.

7. Instead, CALJIC 8.30 and 8.31 must refer to two *alternate* theories of second-degree murder. This reading is consistent with the common-law understanding of 'reckless indifference' second-degree murder.

8. This theory is simply not applicable to Count I. There, Fowler was a specific person and not one of a nameless, faceless crowd. The act itself demonstrates that it was designed to kill. The trial court recognized this when it found that this was not an implied malice case. (RT 2676). Having recognized that the murder was not an implied malice murder, it was improper to instruct pursuant to 8.31. That instruction is only appropriate in cases of implied malice:

> California law, in turn, recognizes three theories of second degree murder.
> ...
> The second, of particular concern here, is implied malice murder. (See CALJIC No. 8.31 ["Murder of the second degree is [also] the unlawful killing of a human being when: [P] 1. The killing resulted from an intentional act, [P] 2. The natural consequences of the act are dangerous to human life, and [P] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [P] When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being."].)

People v. Swain, 12 Cal.4th 593, 601 (1996).

9. Instructing on CALJIC 8.31 eliminated the requirement of finding an intent to kill by applying the inapplicable theory of recklessness to an act which otherwise required a "specific" showing of intent.

10. The prosecution has the burden of proving each element of an offense beyond a reasonable doubt. *See, e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Sandstrom v. Montana*, 442 U.S. 510 (1979), *Patterson v. New York,* 432 U.S. 197, 214-215 (1977); *In re Winship*, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Here, the erroneous jury instruction relieved the prosecution of that burden.

11. The error of this instruction was exacerbated by the archaic language used in it. This Court explained:

> As we have shown, the term "wanton" has various applications connoting *conscious* or *knowing* acts, and is firmly rooted in the common law. Still, the term is not in common use in contemporary daily speech, and there remains the possibility that many laypersons will be unfamiliar with its meaning. We see no "compensating advantage" to the continuing use of obscure phraseology to instruct jurors on the complexities of homicide law.

People v. Dellinger, 49 Cal.3d 1212, 1221 (1989).

12. In the end, not only was an element of second-degree murder removed, it was replaced with "obscure phraseology" unfamiliar to jurors.

13. The verdicts rendered violated petitioner's constitutional rights. The trial court failed to instruct on a necessary element of the charged offense. The jury was thus not required to find that element beyond a reasonable doubt.

14. Petitioner's conviction on Count I and the penalty verdict must be reversed, as it is reasonably likely that the unlawful conviction on Count I contributed to the jury's verdict in the penalty phase. Both verdicts violate petitioner's Sixth Amendment right to have all necessary elements determined by the jury, as well as his Due Process right under the Fifth and Fourteenth Amendments and heightened capital case scrutiny under the Eighth Amendment.

CLAIM 55: The Trial Court Erred by Giving a Misleading Jury Instruction, When a More Precise Instruction Was Requested by Trial Counsel and Violated Petitioners Due Process Rights under the Fourteenth Amendment.

1. The trial court instructed the jury pursuant to CALJIC 8.75, in relevant part:

> If you unanimously agree that the defendant is guilty of said offense charged in both counts 2 and 3, you will have your foreman date and sign the verdict form to which your verdicts apply.

2. Trial counsel objected to the wording of CALJIC 8.75 as misleading and inaccurate. The insertion of the word 'both' was misleading; he requested that it be replaced with 'either or'. (RT 2768).

3. The court overruled trial counsel's objection and stated:

> I'm not going to turn this into a Philadelphia set of instruction. You've noted your objection. I'm just going to overrule it just because we keep pampering [sic] with these until they make Shakespear look – . . . You can cover it in your argument, and I think that I would hope that both counsel are going to address the jury verdicts and how to go through them.

(RT 2722).

4. The instruction was reasonably likely to confuse the jurors who might think that they had to return a verdict of guilty on both charges. It violated petitioner's right to have the jury render an individual determination on each charge. *See generally Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998) (requiring separate consideration and

determination of counts).

5. The court's refusal to alter the instruction was based solely on its feeling that too much time had been spent changing the wording of the instructions already.

6. The Eighth Amendment requires a heightened degree of reliability in capital cases. *See, e.g., Caldwell v. Mississippi,* 472 U.S. 320 (1985). Minimal effort would have been involved in altering the instruction so that it was not confusing and misleading. The Eighth Amendment required the court to exert such minimal effort in this capital case, rather than (1) allowing an incorrect statement of law to go to the jury and (2) relying on counsel to clear up that erroneous statement of law.

7. It is vital, when faced with a multi-count information, that the jury make a determination of each charge separately. The jury "must consider the evidence applicable to each offense as though it were the only accusation." *People v. Holbrook*, 45 Cal. 2d 228 (1955). This requirement should have been made clear to the jury. Altering one word in the proposed instruction was necessary to explain the jury's role.

8. The misleading instruction prejudiced petitioner by linking a non-death eligible count with a death eligible one. Count III was the only count which was death eligible. Counts I and II took place in 1976 while California did not have the death penalty. This linkage unfairly skewed the jury toward both a first degree murder conviction on Count III and a true finding of the sole special circumstance of multiple murder.

9. Count I was, at most, second degree murder as a matter of law. The facts of Count III were markedly similar to Count I. The facts of Count II created an additional basis for a first degree murder conviction – namely, killing a witness. By linking Count III with Count II, the instructions unfairly increased the likelihood that the jury would find Count III to be first degree murder, and thus death eligible under the multiple murder special circumstance. If the jury thought that Count III was second degree murder and Count II was first degree murder and understood the jury instruction to require them to find the same

verdict on both counts as the instruction stated, then it is reasonably likely that the jury found that first degree verdict on Count III was mandated by a first degree verdict on Count II. This finding transformed an otherwise non-death eligible verdict into a death eligible one.

10. The instruction was misleading and ambiguous and should have been changed when requested by trial counsel. Failure to do so was constitutional error and deprived petitioner of his Due Process rights under the Fourteenth Amendment as well as his right to a jury trial under the Sixth Amendment, and heightened capital case reliability under the Eighth Amendment.

4. PENALTY PHASE.

CLAIM 56: The Trial Court Erred in Rejecting the Waiver of Jury for the Penalty Phase.

1. Prior to the guilt phase, petitioner moved the court to waive the jury at the penalty phase. (CT 331). The court improperly denied the motion. The court found that the prosecution was entitled to a jury trial and the prosecutor refused to waive a jury in the penalty phase. (RT 188-189).

2. Though the Supreme Court has recently held that a defendant has a federal constitutional right to a jury trial on penalty (*Ring v. Arizona*, 536 U.S. 584, 609 (2002), at the time of petitioner's trial there was no federal constitutional right to a jury penalty determination, (*Spaziano v. Florida*, 468 U.S. 447, 465), nor was there a comparable state constitutional right. *People v. Robertson*, 49 Cal.3d 18, 36 (1989). However, since California had enacted a statute establishing jury determination of penalty in capital cases, this right could not arbitrarily be denied a defendant. *See Hicks v. Oklahoma*, 447 U.S. at 346.

3. Since the right to a jury trial is statutorily determined, one must examine the 1977 death penalty law to determine whether petitioner had a right to waive jury trial and

whether that right could be denied by the prosecution's failure to consent to the waiver. Under that statute, there was no provision for the prosecution to bar a defendant's waiver of jury if a jury heard the guilt phase.

a. Former Penal Code § 190.4(b) established that a defendant had the right to a jury determination of penalty even if a court sitting without a jury was the trier of fact in the guilt phase. A waiver of a jury was statutorily conditioned upon agreement by both the defendant and the prosecution.

b. However, when a jury was the trier of fact in the guilt phase, Penal Code § 190.4(c) required that the same jury hear the matter "unless for good cause shown the court discharges the jury in which case a new jury shall be drawn." The statute did not provide for prosecution agreement to the waiver of that jury at the penalty phase.

c. Moreover, the statute specifically gave the prosecution a right to waive the jury under certain circumstances, but was silent in regard to the situation in petitioner's case. Accordingly, it must be assumed that the legislature did not intend for the prosecution's right to waiver to be applicable to a case like petitioner's.

4. While there may be no federal constitutional right to the waiver of jury over the objection of the prosecution, the denial of a waiver by the defendant can deny the defendant the due process of law guaranteed by the Fourteenth Amendment. *Singer v. United States*, 380 U.S. 24 (1965). The *Singer* court noted that "there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the government's insistence on trial by jury would result in the denial to the defendant of an impartial trial." *id.* at 37.

5. There were "compelling reasons" for the grant of petitioner's waiver of a penalty jury. Joined together for trial were non-capital cases with a capital murder charge;

the only evidence connecting petitioner to the first killings was his alleged confession made almost two years after the crimes. The defense presented to the jury at guilt phase was a denial of responsibility for the first killings together with an admission to the last one. Petitioner's motions for severance were opposed by the prosecution and had been denied at the time of the denial of his waiver of jury trial. Thus, the guilt phase jury would hear highly inflammatory evidence about the killings of three children and antagonistic defenses to those killings. The defense rightly believed that a jury having heard this guilt phase would not be able to fairly determine the appropriate penalty.

6. Because the jury was also going to determine the penalty, the jury panel was required to be "death qualified." The acceptance of the jury waiver prior to the guilt phase would have rendered the death qualification of the jury unnecessary. Here, nine potential jurors were removed from the panel solely because of their opposition to the death penalty. Thus, petitioner was denied his right to a fair cross-section of the community in violation of the Sixth and Fourteenth Amendments because of the improper denial of his waiver of jury for the penalty phase.

7. In the face of these compelling reasons, the prosecutor merely stated that he did not want to waive jury. The state does not have either a statutory or constitutional right to a jury trial in a California criminal case. The harm to petitioner was so great that the denial of his waiver resulted in an unfair trial at both the guilt and penalty phases, thus denying him the right to the due process of law under the Fourteenth Amendment and his right to reliable sentencing in a capital case as guaranteed by the Eighth Amendment.

CLAIM 57: The Trial Court Erred in Failing to Order Trial Counsel to Inform Petitioner of the Penalty Phase Preparation and Plan.

1. Following the guilty conviction and prior to the start of the penalty phase, petitioner made a motion, out of the presence of the District Attorney, to relieve counsel, or, in the alternative "[o]rder them to tell me what he is going to do at the penalty phase."

(RT 2893-1).

2. Petitioner thereafter explained that his attorneys refused to disclose their plans concerning the penalty phase. Petitioner stated "I have no idea whatsoever" referring to what counsel had planned. *id.* The court responded that it would not order counsel to interfere with the attorney-client relationship. *id.* Petitioner then told the court "There isn't any relationship. They are telling me I don't have a right to know what's going to be done at the penalty phase of the trial." *id.* When asked to explain, defense counsel stated that petitioner did not want evidence presented at the penalty phase and that petitioner had told defense counsel he would make sure that witnesses who were contacted would not show up. (RT 2893-2).

3. Petitioner explained:

> I don't know who he is planning on calling. I haven't talked to anybody about not showing up or anything like that because I haven't had any idea who he is planning on because I have no idea what he is talking about. I believe I have a right to know what is going to be done at the penalty phase or what isn't going to be done.

(RT 2893-3).

4. Responding, the court said to counsel, not petitioner:

> Mr. Larkin, I am not going to tell you what to do. That's ultimately your decision. It would seem to me that it would be important to discuss what's going to happen with your client. If your client takes steps to prevent that, that does not in any way, shape or form reflect back on you.

Twice more, the court replied that it would not order defense counsel to respond to petitioner's request to be apprised of what was to occur at the penalty phase. (RT 2893-4, RT 2893-6).

5. The trial court's refusal to act in response to petitioner's request resulted in the deprivation of effective assistance of counsel. Once apprised of the problem, the court was duty bound either to order trial counsel to confer with petitioner regarding the penalty phase or, in the alternative, to relieve counsel.

6. Trial counsel failed in his duties by refusing to consult with petitioner. A

criminal defendant has the right under the California and United States Constitutions to be informed of decisions in his case, even if counsel controls tactical decisions. Indeed, the right to counsel and the right to be "personally present with counsel" at trial (California Constitution, Art. I, § 15) would be illusory if counsel were allowed to keep secret from his client his plans for trial. Such action by trial counsel also deprives a defendant of his Sixth Amendment right to counsel.

7. Petitioner was effectively prevented from consulting with his counsel because counsel refused to talk to him about the penalty phase preparations. It is irrelevant that at some earlier time they may have discussed the penalty phase. Petitioner had an ongoing right to consultation with counsel about the most important event in his life.

8. Counsel told the court that he had explained "what's going on" to petitioner and that he simply was not informing him of the witnesses he was contacting. (RT 2893-5). The witnesses to be called, however, are a significant portion of "what's going on" in a case. It can hardly be said that an attorney is keeping his client informed as to the proceedings by merely informing him that he is contacting witnesses, without telling his client who he is contacting, who he intends to call to testify or what testimony he expects to elicit.

9. Defense counsel's asserted reason for not discussing the penalty phase preparations with petitioner, i.e., that petitioner was allegedly going to somehow interfere, was disputed by petitioner. In fact, petitioner insisted that he had not interfered with any attempts to consult witnesses. The court, faced with a clear breakdown in the attorney-client relationship, made no attempt to resolve the matter. Additionally, even if it were shown that petitioner somehow wanted to "sabotage" his court-appointed attorneys' planned defense, there would still be no compelling reason to deny him participation in penalty phase preparation .

10. In part because of this breakdown in communications between client and counsel, the defense only presented one witness at the penalty phase. Indeed, this Court's

opinion summarizes the defense penalty phase case in one paragraph. *People v. Memro II*, 11 Cal. 4th 786, 816 (1995). Had petitioner received the cooperation of counsel, extensive mitigating evidence would have been presented.

11. Given the one witness showing at the penalty phase because of this breakdown in the attorney-client relationship and the fact that the court repeatedly refused to replace ineffective counsel, the prosecution cannot sustain its burden and the death sentence must accordingly be reversed as violative of petitioner's federal and state constitutional rights to the assistance of counsel and a rational, reliable and individualized sentencing determination and Sixth and Eighth Amendments.

CLAIM 58: The Trial Court Erred in Admitting Petitioner's Testimony at the Penalty Phase.

1. Petitioner was permitted by the court to make a statement to the jury at the penalty phase. He testified:

> While I do not concede the truth, accuracy, or correctness of the jury's verdicts, I do feel that since the jury has returned the verdicts of guilty in the maximum degree possible on all counts and the special circumstance, that they should also now return with a verdict of death as the appropriate penalty. Thank you.

(RT 2969).

2. The court neither counseled petitioner as to his decision to testify, nor gave an instruction to the jury concerning petitioner's testimony. The court realized that petitioner's testimony was irrelevant to the factors that must be considered by the jury in reaching the penalty determination.

3. The court noted, outside the presence of the jury, that petitioner's testimony "goes to [his] reasons for wanting the death penalty as opposed to whether or not the penalty is the appropriate punishment." (RT 9692). This was error which mandates reversal of the penalty. The effect of petitioner's testimony was to compel the death penalty.

4. The lack of an instruction was exacerbated by the prosecutor's improper cross-examination of Mr. Reno and his emphasis on Mr. Reno's testimony in his closing

argument. Indeed, the prosecutor asked the jury to grant petitioner's request. (RT 2981).

5. Mr. Reno's unlimited testimony was at least as devastating as a situation in which the jury was not presented any mitigating evidence. Petitioner's testimony relieved the jury of its full responsibility to fix the penalty based upon the proper statutory factors. Instead, it led the jury to believe that it could return the death penalty simply because the petitioner requested it rather than because the statutory factors warranted it.

6. Indeed, the testimony was totally irrelevant to any statutory factor in aggravation or mitigation under California law.

7. This likely lead to a feeling of diminished responsibility for the jurors' actions and therefore the penalty verdict was unreliable and arbitrary in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

5. CLAIMS RELATING TO PENALTY PHASE INSTRUCTIONS.

CLAIM 59: The Trial Court Failed to Tailor the Instruction Concerning the Factors in Aggravation Which the Jury Could Consider.

1. At a discussion regarding the penalty phase jury instructions, defense counsel requested that the following factors be omitted from CALJIC 8.84.1 because they were not relevant to the case:

> e. Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;
>
> . . .
>
> i. The defendant's age at the time of the offense;
>
> j. Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(RT 2898).

2. The court omitted factor (i) but permitted the other irrelevant factors to remain before the jury as sentencing criteria to be considered in this case.

3. In arguing that factors (e) and (j) were relevant, the prosecutor told the court

"whether or not the victim is a participant goes to the gravity of the defendant's conduct so it is more serious" and "the offense is more serious if he is not an accomplice." (RT 2899). The court agreed with this argument. (Id.)

4. During closing argument, in referring to these factors, the prosecutor stated:

> Whether or not the victim was a participant in the defendant's homicidal conduct. **Obviously that wasn't the case in any of these crimes.**
>
> . . .
>
> Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense is relatively minor. **And again that's not the situation. He did it all.**

(RT 2977-2978; emphasis added).

5. The unedited instruction, coupled with the prosecutor's argument, constituted prejudicial error because it permitted the jury to consider the lack of mitigating factors as factors in aggravation. The prosecutor's comments were not simply that the factors did not apply, but rather his argument was that petitioner should be punished because these mitigating factors were absent. The prosecutor's earlier argument to the court underscored his position that the absence of factors was not simply neutral.

6. This Court has held that it is error for the prosecutor to argue that a lack of mitigating factors could be counted as factors in aggravation. *People v. Davenport*, 41 Cal.3d 247 (1985). Although this Court later held that the failure to delete inapplicable factors did not constitute reversible error (*People v. Ramirez*, 50 Cal.3d 1158, 1198 (1990), here the failure to tailor the instruction interjected irrelevant and confusing considerations into the jury's sentencing calculations, in violation of the Fifth, Eighth and Fourteenth Amendments.

7. Moreover, the court's application of *Ramirez* in this case constituted a retroactive and *ex post facto* application of substantive law, in violation of due process.

8. The penalty determination must be based upon "consideration of the character

and record of the individual offender and the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. at 304. "The focus must be on *his* culpability . . . for we insist on `individualized consideration as a constitutional requirement in imposing the death sentence.'" *Enmund v. Florida*, 458 U.S. 782 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). To reach a reliable verdict, the jury must be given "guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision." *Gregg v. Georgia*, 428 U.S. 150, 158 (1976).

9. The jury in this case was led to believe, by the improper instruction and the prosecutor's argument, that because the victims were not participants in the crime and petitioner acted alone, rather than as an accomplice, weighed in favor of the death penalty. This created an impermissible risk of an arbitrary and capricious verdict of death. For this reason, the sentence must be overturned.

CLAIM 60: The Trial Court Erred in Failing to Instruct on the Elements of the Uncharged Offense at the Penalty Phase and in Describing that Offense in Highly Inflammatory Language.

1. The prosecution introduced evidence at the penalty phase that petitioner had assaulted David Schroeder in 1972, when Schroeder was a young boy.

2. The court considered the appropriate instruction to give to the jury regarding this offense.

3. The prosecution initially requested a Penal Code § 245 instruction for assault with intent to do great bodily injury. (RT 2935). In the same discussion, the prosecutor noted that petitioner had been convicted of a violation of Penal Code § 273(d), corporal punishment upon a child. (RT 2936). That conviction had been held by the trial court to be unconstitutional for all purposes.

4. Nevertheless, the trial court, over the objection of defense counsel (RT 2936), adopted this definition of petitioner's actions and instructed the jury in the

following terms:

> Evidence has been introduced for the purpose of showing that the defendant Memro has committed the following criminal activity: cruel or inhumane bodily injury on a child which involved the express use of force.
>
> (RT 2974).

5. The court did not instruct the jury on the requisite elements of this offense.

6. The court erred by failing to define the elements of the offense and by giving an inflammatory description of the offense.

7. Even though the jury was told that they had to find that this offense was true beyond a reasonable doubt, they were not provided information that would enable them to understand what the actual elements of the offense were. Failure to so instruct therefore violated petitioner's Eighth Amendment right to reliable sentencing.

8. The court's use of an inflammatory description of the offense prejudiced petitioner. The jury could have been instructed in the more neutral terms of Penal Code § 245, as first requested by the prosecutor. Instead, the court opted for a definition of "cruel and inhumane bodily injury on a child" without any definition of those terms. This prejudiced petitioner, especially in light of the nature of the offenses for which he had just been convicted, and created an impermissible risk of the arbitrary and capricious imposition of the death penalty, in violation of the Eighth Amendment.

CLAIM 61: The Jury Was Improperly Instructed as to the Scope of Mitigating Evidence it Could Consider.

1. During the penalty phase, petitioner's sister testified that their alcoholic father had been abusive and that their mother was very strict. She testified to petitioner's severe headaches and his fights with his father. She also discussed their parents' inability to cope and come to terms with petitioner's homosexuality. The remainder of her testimony related to petitioner's character.

2. The jury was instructed under former CALJIC 8.84.1(k) that it could consider

"any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse, if the crime and any sympathetic or other aspect of the defendant's character or record is a basis for a sentence less than death, whether or not related to the offense for which he is on trial ..."

3. Because the bulk of the evidence offered in mitigation related to petitioner's background, the instruction should have been modified to include "background" as a basis for the jury's consideration of the appropriate penalty.

4. It is likely that the failure to include the word "background" in factor (k) of CALJIC 8.48.1 led the jury to believe that it could not consider a major portion of his sister's testimony. This belief was undoubtedly reinforced by the prosecutor's argument that the mitigating evidence consisted of the fact that petitioner's "sister still loves him." (RT 2978). The prosecutor omitted mention of the background evidence that had been presented in mitigation as something the jury could consider.

5. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court held that the sentencer in a capital case could consider any factors concerning the defendant, even those not pertaining to the offense, in deciding whether or not to impose the death penalty. The court noted:

> [W]here sentencing discretion is granted, it generally has been agreed that the sentencing judge's possession of the fullest information possible concerning the defendant's life and characteristics is `highly relevant'—if not essential— [to the] selection of appropriate sentence. [Citation.]"

Id. at 602-603 citing *Williams v. New York*, 337 U.S. 247 (1949).

6. The cases concerning sentencing discretion have generally referred to a defendant's "character and record." *Id.* at 604; *Woodson v. North Carolina*, 428 U.S. at 304. Thus, the language of any instruction must be broadened when background evidence is offered. Background evidence is admissible on the subject and is properly considered by the sentencer. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982).

7. Failure to tailor the instruction in this case prejudicially misled the jury into disregarding pertinent evidence and failing to give consideration and full effect to constitutionally relevant mitigation evidence. This unfairly skewed the verdict toward death, in violation of the Eighth and Fourteenth Amendments.

8. The factors in aggravation in this case were relatively few—the circumstances of the crime and the single prior incident of assault. Had the jury been properly informed that it could consider background evidence, it is likely that it would have concluded that the aggravating factors did not outweigh those offered in mitigation.

9. Instructions that fail "to tell the jury that any aspect of the defendant's character or *background* [can] be considered mitigating, and [can] be a basis for rejecting death even though it did not necessarily lessen culpability . . . [are] constitutionally inadequate. *People v. Lanphear*, 46 Cal.3d 163, 167-168 (1984) (emphasis added).

10. When the jury is instructed that it may consider a background of abuse as a child, this is in fact highly likely to influence the jury in the defendant's favor. The instruction in this case did not so inform the jury and therefore was constitutionally inadequate. Petitioner's sentence must therefore be overturned.

CLAIM 62: The Trial Court Erred in Instructing the Jury that there Must be Unanimous Agreement as to Penalty.

1. Petitioner was tried under the 1977 death penalty statute.

2. That law provided in pertinent part:

> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without the possibility of parole.

Penal Code § 190.4(b).

3. That section was later amended by initiative to permit retrial of the penalty phase if there was not unanimous agreement by the jury as to penalty.

4. Under the 1977 law, the jury, in order to make a determination to impose a

penalty of life without parole, did not have to be unanimous. If only one juror believed that death was not the appropriate sentence, a defendant would automatically receive a life sentence.

5. The trial court instructed the jury pursuant to CALJIC 8.84.2 that "[i]n order to make a determination as to penalty, all 12 jurors must agree." (RT 2993).

6. The instruction given here was proper under the 1978 law, but was improper under the 1977 law under which petitioner was tried. It was error to instruct on law which was not in existence at the time the alleged crimes took place.

7. This is almost identical to the instruction given and condemned in *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992). In *Mak*, the Ninth Circuit found the jury instructions to be a violation of the right to due process.

a. In *Mak*, the defendant had been sentenced to death in the State of Washington. State law presumed a sentence of life, which could only be overcome by a unanimous verdict that the mitigating circumstances did not merit leniency. The jury in *Mak* was instructed without objection that "[a]ll twelve of you must agree before you answer a question `yes' or `no.'" *Id.* at 624).

b. The jury was then provided three choices to the question of whether there were sufficient mitigating circumstances: "yes," "no," or "unable to agree unanimously."

c. The Ninth Circuit found the unanimity instruction to be erroneous.

8. Similarly, the Seventh Circuit reversed a death sentence where a state jury in Illinois was not informed that the death penalty could not be imposed if one juror believed that there were sufficient mitigating factors to impose a life sentence. *Kubat v. Thieret*, 867 F.2d 351 (1989), *cert. denied*, 493 U.S. 874 (1989).

a. The *Kubat* court held that the instruction was a violation of the defendant's

Eighth and Fourteenth Amendment rights and reversed the sentence on that ground.

b. The court further determined that the error was prejudicial because of the impact the instruction could have had on any one juror:

> Whether the jury was completely misled or merely confused would not alter our determination that Kubat was prejudiced. At worst, the jury may have retired for deliberations believing it had to reach a unanimous verdict on sentencing just as it had to do on the merits. At best, it may have entered the jury room confused. Indeed, even if only one juror had been confused, the reliability of the verdict is undermined. For if that one juror thought that the death penalty should not be imposed, he or she might have submitted to the views of the other eleven because of a mistaken belief that unanimity was required.

Id. at 371.

9. The court's instruction in this case not only failed to inform the jury that the verdict did not have to be unanimous to impose a life sentence, but specifically and erroneously instructed to the contrary. Unlike the jury in *Mak*, the jury in petitioner's case was not directly told the effect of an inability to agree on the sentence, thus increasing the likelihood of prejudice.

10. The error violated petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair, reliable and individualized sentencing.

CLAIM 63: The Trial Court Erred in Refusing a Lingering Doubt Instruction at the Penalty Phase.

1. Petitioner's conviction, special circumstance findings and sentence of death are illegal and were unconstitutionally obtained in violation of his Sixth, Eighth and Fourteenth Amendment rights to a fair trial, to a reliable and accurate determination of penalty and to due process of law, as a result of the trial court's refusal to instruct on lingering doubt.

2. The violations of these rights, individually and cumulatively, prejudicially affected and distorted the presentation and consideration of evidence as well as every

factual and legal determination made by the state courts and the jurors.

3. Had these violations not occurred, petitioner would not have been convicted or sentenced to death.

4. The jury at the guilt phase deliberated for over two full days. At the conclusion of the penalty phase, petitioner requested an instruction on "lingering doubt" pursuant to *People v. Terry*, 16 Cal.2d 731 (1964). (RT 2941). The prosecutor opposed the instruction on the grounds that it was presented in an untimely fashion. The court refused the instruction without comment. (RT 2942).

5. The refusal to give a lingering doubt instruction was error and deprived petitioner of his constitutional rights. The failure to give the lingering doubt instruction left the jury without a vehicle to give effect to mitigation, in violation of petitioner's Sixth Amendment right to effective assistance of counsel, his Eighth Amendment right to a fair and reliable sentence, and his Fourteenth Amendment due process right to present evidence at the penalty phase and to be sentenced in accordance with state law. *Lockett v. Ohio,* 438 US 586 (1978); *Skipper v. South Carolina,* 476 US 4 (1986). A defendant's right to present penalty phase evidence is critical in order to allow the jury to come to a reasoned decision as to the appropriate sentence, and avoid an arbitrary and capricious verdict. *Gregg v. Georgia,* 428 US 153,189-190 (1976). It is error to refuse a properly drawn lingering doubt instruction. cf. *People v. Thompson*, 45 Cal.3d 86 (1988) and *People v. Cox*, 53 Cal.3d 618 (1991). Trial counsel requested a proper instruction which was nevertheless denied by the trial court.

6. The penalty phase defense centered largely on the concept of lingering doubt and was supported by petitioner's testimony.

7. This Court determined:

> Had the requested instructions actually asked the jury to consider any lingering doubts about defendant's intent to kill, despite the sufficiency of evidence to support [the jury's] special finding, we might seriously consider

> whether refusal to give such instruction was error. In *People v. Terry* [61 Cal.2d 137], we noted a defendant may call upon such doubts in the penalty phase. [Citations.] *Id.*, at 134-135.

People v. Cox 53 Cal. 3d 618 at 678 (1991) (citing *People v. Thompson,* 45 Cal.3d 86 (1988)) (superceded by statute on other grounds).

8. Building on *Thompson*, this Court wrote: "As a matter of statutory mandate, the court must charge the jury 'on any points of law pertinent to the issue, if requested'; thus, it may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." *Id.* (Citations omitted). As in petitioner's case, *Cox* involved a first degree murder charge with a multiple murder special circumstance. The court rejected the proposed "formulation because it focused on lingering doubt as to the nature of defendant's participation rather than his guilt." *Id.*

9. Here, in contrast, petitioner's trial counsel requested a properly formulated lingering doubt instruction which was warranted by the evidence presented through petitioner's testimony. The trial court denied it nonetheless.

10. The trial court's refusal of the instruction violated petitioner's federal constitutional due process rights as it arbitrarily denied him a state created liberty interest in that instruction. *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980); *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993).

11. For a jury determination of death to stand against Eighth Amendment scrutiny, the jury's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (quoting *Gregg v. Georgia,* 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell and Stevens, JJ).

12. If a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious

infliction of the death penalty. Part of a State's responsibility is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." It must channel the sentencer's discretion by "clear and objective standards" which provide "specific and detailed guidance" and that "make rationally reviewable the process for imposing a sentence of death."

13. As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972) could occur." *Godfrey*, 446 U.S. at 428.

14. The Court reiterated this message in *Walton v. Arizona*, 497 U.S. 639, 653 (1990), saying, "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process."

15. *Cox* and *Thompson* are consistent with Supreme Court holdings that a sentencer may not be precluded from considering *any relevant* mitigating evidence. *See, e.g., Eddings v. Oklahoma* 455 US 104 (1982). In *Eddings*, the Court explained:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider *as a matter of law,* any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf.

Id. at 837.

16. Petitioner's jury was never told it could consider lingering doubt as mitigation– thus, "it was as if the trial judge had instructed [petitioner's] jury to disregard the mitigating evidence [petitioner] proffered on his behalf." *See id.* It follows that although the jury determines the appropriate weight to be given to the mitigating evidence, the jury "may not give it no weight by excluding such evidence from their considerations." *Id.* at 115; *see also McDowell v. Calderon*, 130 F.3d 833, 837 (9th Cir. 1997) (*en banc*).

17. Petitioner's guilt of the charged crimes was contested. The jury returned varied verdicts and deliberated for some two days, indicating lingering doubt. The jury was impermissibly precluded from considering relevant mitigating evidence by the trial court's ruling denying the lingering doubt instruction. The resulting verdict is unreliable:

> A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally-mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions.

McDowell v. Calderon, 130 F.3d 833, 837 (9th Cir. 1997) (*en banc*).

18. The trial court's failure to give a lingering doubt instruction was exacerbated by the prejudicial effect of counsel's failure to inform the jury in argument on lingering doubt as well. Despite the fact that the evidentiary theory presented in the penalty phase centered largely on lingering doubt, the jury was never presented with a framework for considering it.

19. The jury was neither told by the court nor trial counsel that they were to consider it at all. There can be no doubt that the evidence was mitigating, as it might have formed the basis for a sentence of life without parole. *See Skipper v. South Carolina,* 476 U.S. 1, 4-5 (1986) (evidence is mitigating if it "might serve 'as a basis for a sentence less than death'") (quoting *Lockett,* 438 U.S. at 601). Deprivation of a lingering doubt instruction in this case was tantamount to a deprivation of a penalty phase at trial.

20. The central issue at the trial was the truthfulness of petitioner's alleged "confession" regarding the first two homicides, which occurred in 1976. The jury requested a reread of petitioner's confession to these homicides during their deliberations. (RT 2878).

21. Given the length of the guilt phase deliberations and the re-read of the testimony, the lingering doubt instruction was essential to direct the jury's deliberations at

the penalty phase.

22. This is especially true under the 1977 death penalty law, which mandated the imposition of a life sentence if the jury was unable to reach a unanimous verdict on penalty. It only took one vote to ensure a life verdict.

23. Failure to give the instruction precluded the jury from considering and giving full effect to relevant mitigation, arbitrarily deprived petitioner of his right under state law and resulted in the arbitrary and capricious imposition of the death penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

CLAIM 64: The Death Verdict Must Be Reversed Because the Court Failed to Instruct the Jury That the Guilt-phase Instruction to Disregard the Consequences of its Verdict Did Not Apply to its Deliberations at the Penalty Phase.

1. Prior to the guilt phase deliberations, and pursuant to CALJIC No. 1.00, the jurors were properly instructed not to consider the consequences of their verdicts in making their guilt phase determinations. CALJIC 1.00, as given in this case, provides in relevant part:

> You must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent. You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

(CT 456-457).

2. At the penalty phase, the jurors were given no admonishment to disregard CALJIC 1.00, denying petitioner due process, a fair jury trial and a reliable capital sentencing determination pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments.

3. The instruction gave the jurors the false impression at the penalty phase of this trial that they were not responsible for the consequences of their verdict, by suggesting

that it was possible for them to discharge their duties to sentence without considering the consequences.

4. The jurors, "confronted with the truly awesome responsibility of decreeing death for a fellow human", failed to "act with due regard for the consequences of their decision." *Caldwell v. Mississippi,* 472 U.S. 320, 329-330 (1985) *(quoting from McGautha v. California,* 402 U.S. 183, 208 (1971). The instruction had the "effect of substantially reducing the Government's burden of proof" since the jury was not instructed as to the weight of its decision. *See Cool v. United States*, 409 U.S. 100, 104 (1972). The minimizing of the jury's sense of responsibility impermissibly infringed upon petitioner's jury trial rights as well. *Id.*

5. Under these cases, the jury was entitled to consider sympathy for the defendant. The failure to instruct the jury to disregard CALJIC 1.00 left the jurors the impression that they could not do so. Petitioner's constitutional right under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated.

6. SENTENCING.

CLAIM 65: The Trial Court Erred in Denying Petitioner's Automatic Motion for Modification of Sentence.

1. At the hearing on sentencing, the trial court denied petitioner's motion for modification of the sentence under Penal Code § 190.4(e).

2. Former Penal Code § 190.4(e), the applicable law at the time, provides as follows:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made a modification of such verdict or finding pursuant to subdivision 7 of section 1181. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.

3. The court failed to follow the proper procedures.

4. The court considered irrelevant factors. Penal Code § 190.4(e) is clear that the court must be guided by the aggravating and mitigating circumstances set forth in Penal Code §190.3.

5. However, the court based its denial, in part, upon petitioner's personality, expressing its opinion that petitioner was "obdurate," "truculent," "defiant," and "particularly insensitive." These are not factors that could properly be considered under Penal Code § 190.3 and are not the type of characteristics of the offender on which a death penalty may be based. *Coker v. Georgia*, 334 U.S. 485 (1977). In fact, the judge's opinion as to the existence of these factors was no doubt based upon the sum of his experience with petitioner, through various in camera proceedings and other pretrial hearings out of the presence of the jury. In short, the information upon which the court formed its opinion was never before the jury.

6. In addition, the court reviewed a probation report that had been ordered sealed by a previous court prior to its ruling on the 190.4(e) motion. (RT 3002, 3016-3017). It is error for the judge to consider the probation report in this context. *People v. Lewis*, 50 Cal.3d 262, 287 (1990). To the extent these terms are viewed as involving "lack of remorse," the findings were not limited to the time of the offense as required by California law. Petitioner refused to talk to the probation officer, who simply incorporated the prior 1979 report. Petitioner also objected to consideration of the prior report which had been sealed by the previous judge. (See Claim 83). The court's conclusion that petitioner remained "obdurate" is clearly based in part on the probation report. Because of the improper reliance on this report and its impact on the judge as reflected in his comments, this matter should have been remanded for a new 190.4(e) hearing. It would have been improper for the jury to condemn petitioner because of his personality, and it was therefore improper for the court to do so.

7. Additionally, the court erred in relying on petitioner's "lack of remorse" in

upholding the jury's verdict. This ourt has held that remorse may be treated as a mitigating factor and its absence may be pointed out by a prosecutor in argument. *People v. Gent*, 43 Cal.3d 739, 771 (1987). However, it is clear that the absence of a mitigating factor cannot be construed as a factor in aggravation (*People v. Davenport*, 41 Cal.3d 247), except perhaps when considered at the time of the offense, and yet that is exactly what the trial court did in this case.

8. The court also failed to take into account the mitigating evidence of petitioner's character and background offered on his behalf during the penalty phase. The absence from the record of any mention of that evidence indicates that the court did not consider and reject that evidence, but rather, it failed altogether to figure it into the weighing process. This clearly constituted error under Penal Code § 190.4(e), which compels the court to take into account mitigation factors.

9. The court's failure to properly apply Penal Code § 190.4(e) was prejudicial. The factors in aggravation, the circumstances of the crime and petitioner's prior incidents were not overwhelming when compared to the mitigating evidence offered on his behalf. Had the court properly weighed those factors, it may well have come to the conclusion that the penalty should be modified.

10. The court also erred in refusing to give *any* mitigating weight to the lack of a prior conviction and the fact that the crimes involved circumstances not likely to recur in custody. This court's decisions explain that factor (c) relates to whether a defendant previously was successfully *prosecuted* for misconduct e.g., *People v. Melton*, 44 Cal.3d 713 (1988). Generally, the facts of the crime may provide *mitigation* as well as aggravation, particularly where facts suggest some mental deficiency or deviant behavior. *See People v. Haskett (II)*, 52 Cal.3d 210 (1990). The fact that the situation giving rise to petitioner's criminal conduct would not be duplicated in custody was a particularly significant factor in making a reliable, *individualized* determination of the appropriate

penalty. Failure to consider, let alone give full effect to relevant mitigating evidence, requires reversal. *See Penry v. Lynaugh*, 492 U.S. 302 (1989) and *Parker v. Dugger*, 498 U.S. 308 (1991).

11. The trial court's arbitrary failure to follow state-imposed procedures denied petitioner's due process rights under the Fourteenth Amendment.

12. For the foregoing reasons, the court's evaluation of the application for modification of the death sentence was incomplete, improper and unconstitutional.

CLAIM 66: The Trial Court Erred in Considering the Sealed 1979 Probation Report.

1. At the first trial, a probation report was prepared upon order of the trial court. However, the court did not read the report before imposing sentence. (RT I 939). At the conclusion of the case, the court ordered that the report be sealed. (CT I 262).

2. Petitioner refused to talk with the probation officer after his conviction at retrial. The probation officer prepared a report that incorporated the 1979 probation report. (RT 3002). Petitioner objected to the use of the prior report based on the inaccuracies in the report and the previous court order sealing that report. (RT 3016).

3. Petitioner's counsel failed to challenge the contents of this report and the trial court improperly considered the incorporated 1979 probation report during the modification motion and the sentencing in this matter in 1987. (RT 3017).

4. Petitioner exercised his right not to talk with the probation officer who prepared the report. When the officer improperly incorporated a prior sealed report, he did so without any order by the court to unseal the prior document. The unsealing could be accomplished only by an appropriate court order. Since no unsealing order was ever entered, the court erred in its consideration of the incorporated 1979 probation report in the resentencing for any purpose.

5. Petitioner had a clear right against self-incrimination at the time the

probation officer sought to interview him. *Estelle v. Smith*, 451 U.S. 454 (1981). The court erred in considering the sealed 1979 probation report in light of the on-the-record objection raised by petitioner. Indeed, the court improperly considered the refusal of petitioner to talk with the probation officer as demonstrated by the trial court's reliance on petitioner's continued defiance in violation of petitioner's Fifth Amendment right against self-incrimination. (RT 3015).

E. CLAIMS RELATING TO EVIDENTIARY ISSUES.

CLAIM 67: There was Insufficient Evidence that Carl Carter, Jr. was Killed in the Course of the Felony Defined by Penal Code § 288 at the Time of the Offense.

1. Summed up in its entirety, but briefly, the evidence at the second trial as to Count III shows that there was insufficient evidence that Carter was killed during the course of a felony defined by Penal Code § 288.

2. The prosecutor argued that the killing of Carter was a felony murder (RT 2786-2790), that the victim was killed during the course of a violation or attempted violation of Penal Code § 288. The jury was instructed upon this theory. (CALJIC 8.21, RT 2754).

3. The evidence was insufficient to establish that petitioner committed or attempted to commit a violation of § 288 upon Carter.

4. There was no evidence presented at trial to prove beyond a reasonable doubt that petitioner attempted to sodomize Carter or even formed the intent to do so, until after the victim was dead. Under California law at the time of the offense, as accepted by the trial court and as the jury was instructed, attempted sodomy of a body cannot form the basis for a § 288 violation or for felony murder.

5. Examination of this issue must be based solely on the evidence presented at the second trial. By petitioner's own admission, he was bringing the boy to his room to photograph him. At the time of this act, there was no criminal offense of taking a nude

photograph of a minor (cf. Penal Code § 311.3, enacted in 1981), and there certainly was no evidence that a violation of § 288 occurred or was attempted.

6. At the time of the killing, Penal Code § 288 provided in part:

> Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in part I of this code, upon the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony . . .

See California Statutes, 1976 chapter 1139, § 177 at 5110-5111.

7. It is well established that a violation of Penal Code § 288 requires a touching. See, e.g., CALJIC 10.30. There was no evidence of any touching here. Although the prosecutor argued that the touching element could have been satisfied by petitioner's placing of the clothesline around Carter's neck (RT 7482), there was no evidence to support a finding of the necessary lewd intent. Any such intent was not formed until after the death of Carter. The prosecutor's argument therefore mislead the jury as to what actually could have constituted a violation of Penal Code § 288.

8. The jurors' confusion on this issue was illustrated by their inquiry to the court: "Does Penal Code section 288 regarding the definition of a lewd act with a child apply to both living and deceased bodies?" (RT 2872). The court gave the following answer: "The crime of 288, lewd act with a child, may be committed only on a living child. The attempt or the act must commence while the child is alive." (RT 2877).

9. While the above answer was an attempt to clarify the issue for the jury, it only serves to underscore the insufficient nature of the evidence supporting any felony-murder theory. Following the response to their question, the jury could not have based its conviction upon the acts following the killing, i.e., any attempted sodomy. Therefore, any felony-based murder finding, if any, had to have been predicated on acts that occurred prior to the killing. As stated above, these acts only amounted to petitioner's preparation to

photograph Carter. Any other significance placed upon those acts amounts to mere speculation that cannot support a conviction.

10. In addition, conviction where there exists an insufficiency of the evidence violates the defendant's right to due process of law under the Fourteenth Amendment. Petitioner's conviction and sentence to death were fundamentally unfair, and his sentence was rendered unacceptably unreliable to meet Eighth Amendment requirements.

CLAIM 68: There was Insufficient Evidence of Willful, Deliberate and Premeditated Murder as Defined Under California Law at the Time of the Offense in Counts II and III.

1. In this matter, the only evidence additional to the statements of petitioner concerning the killings is the brief testimony of the coroner who stated that the cause of death in Count II (Chavez) was a "cutting wound to the neck" and in Count III (Carter) was a rope strangulation. (RT 4242).

2. Petitioner's alleged statement regarding the two murders was the only other testimony regarding the killings. Petitioner allegedly told the police that he had been at Ford Park in Bell Gardens on the evening of the Chavez killing charged in Count II. He had struck up a conversation with Fowler and was sexually attracted to Fowler. Chavez had fallen asleep and petitioner and Fowler walked a short distance away.

3. Fowler made a comment "about fucking faggots." (RT 2394). The comment upset petitioner, who grabbed his knife and cut Fowler's throat. (RT 2394). The court at the first trial had convicted petitioner of second-degree murder and the jury at the second trial was instructed that this murder was at most a second-degree murder (RT 6672). According to the police, Chavez woke up and petitioner grabbed him and cut his throat as well. (RT 2394-2395). Petitioner allegedly told the police that he felt bad about Chavez but he had witnessed the other attack. (RT 2501).

4. Petitioner's alleged statement supplied the only evidence regarding premeditation and deliberation in the Carter killing charged in Count III. Officer Carter

said that petitioner admitted that he had invited Carter to his apartment and showed Carter the strobe lights in his bedroom. (RT 2388). At some point, Carter asked to go home. Mr. Reno got upset. Grabbed a clothesline and choked Carter with it. (RT 2388-2399).

5. Here, there was insufficient evidence of premeditation or deliberation in both counts. In Count II, there was no evidence of any planning activity. *People v. Anderson*, 70 Cal.2d 19, 26-27 (1968).

6. The killing of Fowler had been previously held to be a second-degree murder; the Chavez killing quickly followed the Fowler killing demonstrates the lack of planning by petitioner.

7. The circumstances that reduced the Fowler murder to second degree apply equally to the Chavez killing. While the prosecution theorized that Chavez was killed because he "witnessed" the Fowler murder (RT 2501, 2785), this does not distinguish this killing from Fowler's, which occurred moments before. The mentally driven, rash, impulsive behavior that caused Fowler's death remained at the time of Chavez's killing. See also Exhibit CC, Declaration of George W. Woods.

8. As to Count III, evidence of deliberation and premeditation is lacking entirely. None of the recognized three categories of evidence existed in the evidence that was presented to the jury.

9. There is no evidence of planning activity. Indeed, the only rational conclusion to be drawn from Mr. Reno's statement is that he entered the same type of uncontrollable impulsive rage involved in the killing Fowler, which had been determined to be a second-degree murder. He was with Carter and he wanted him to stay. Carter wanted to leave. Mr. Reno grabbed a clothesline and strangled Carter in an impulsive, uncontrollable mental state.

10. Second, there is no evidence of prior relationship or conduct with Carter from which to infer a motive to kill. There is nothing pointing to pre-existing reflection

rather than a rash impulse hastily executed. Indeed, the prosecutor nearly abandoned the premeditation argument, asking the jury to reject the testimony of petitioner and speculate that murder occurred in the commission of the felony. (RT 2789). If petitioner's testimony is rejected, there is no evidence whatsoever of premeditation or motive.

11. The manner of killing may provide the inference of an intention to kill Carter, it does not prove any premeditation or deliberation. The evidence supports a spontaneous second-degree murder.

12. Under California law at the time of the offense, the manner of killing must be "so particular and exacting" that the evidence shows that he "intentionally killed according to a `preconceived design.'" *Id.* at 9, *People v. Anderson*, 70 Cal.2d at 27. The court concluded that the ligature strangulation failed to support a finding of premeditated murder.

13. When all of the evidence is examined, there was insufficient evidence to support a first-degree murder conviction based upon a premeditated and deliberate theory. The unjustified killing of a human being is presumed to be at most a second-degree murder.

14. There was insufficient evidence to support a finding of planning, motive or premeditated manner of killing to support the first-degree murder conviction on Count III.

15. As a result, the trial, conviction and sentence of death were fundamentally unfair, in denial of due process and rendering the sentence too unreliable to meet Eighth Amendment requirements.

F. CLAIMS RELATING TO PROSECUTORIAL MISCONDUCT.

1. GUILT PHASE.

CLAIM 69: The Prosecution's Presentation of Facts was Directly Contrary to those Contained in the Missing-Juvenile Report.

1. The South Gate Police Department missing-juvenile report on Carl Carter, Jr., was prepared on October 22, 1978. The report indicates that Carter was last seen by his brother near the rear of his residence at 7:00 p.m. (1900 hours) on that date. Exhibit S-H,

Missing-juvenile report.

2. The prosecutor was aware of the true facts as set forth in the missing-juvenile report, but nonetheless committed misconduct by presenting contrary evidence.

3. Officer Sims arrested petitioner on October 27, 1978. In determining probable cause for the arrest, Officer Sims purportedly relied heavily on his alleged belief that petitioner was the last person to have seen the boy prior to his disappearance. This alleged belief was based on two purported facts: first, that Carter was claimed to be noticed as missing at 6:00 p.m. and, second, that petitioner admitted his presence at the Carter residence at that time.

4. However, Sims later admitted having been aware of the contents of the missing person report at the time. Moreover, the court, in finding probable cause for the arrest, considered it significant that according to police testimony, petitioner was the last person with Carter prior to his disappearance.

5. The missing-juvenile report directly contradicts a significant factor upon which the arresting officer and the court based the probable cause determination; that petitioner was the last one to see Carter, at around 6:00 p.m. the day of his disappearance.

6. Furthermore, the report corroborates the statement police attributed to petitioner that Carter was safely walking toward his home from a nearby donut shop shortly after 6:00 p.m. The prosecutor presented the officer's testimony supporting his probable cause determination though it directly contradicted the missing-juvenile report in an effort to conceal the illegality of the arrest.

7. Mr. Larkin was, or with adequate investigation would have been, aware of these facts and had no tactical reason for failure to object to the prosecution's actions, but failed to do so.

8. As a result of the above, petitioner was denied a fundamentally fair trial and was denied effective assistance of counsel.

CLAIM 70:The Prosecution's Failure to Inform Petitioner of the Theory of First-Degree Murder on Which it Would Rely in Proving Count III Violated Petitioner's Rights.

1. Petitioner was originally tried on a special circumstance allegation involving a felony-murder theory. The judge at the first trial found that allegation not true. Upon issuance of the remittitur, the prosecution amended the information to strike that special circumstance allegation, maintaining multiple murder as the only basis for a special circumstance finding. (CT 99).

2. During the retrial proceedings, petitioner was charged in Count III with a violation of Penal Code § 187, murder with malice aforethought.

3. Because of the ruling of this Court in *Memro I*, and after the striking of the felony-murder special circumstance allegations, it was incumbent on the prosecutor to inform petitioner specifically of any intention to base its case and prosecute on the felony-murder theory in Count III to allow the defense to prepare its challenge. Furthermore, the prosecutor made no reference to any particular theory prior to trial or in opening statements to the jury.

4. Therefore, based on the verdict in the first trial, the decision in *Memro I*, and the striking of the felony-murder special circumstance, petitioner was entitled to and did reasonably believe under the circumstances of this case that the prosecution had abandoned the felony-murder theory. Thus, he was not given adequate notice of the charges in this matter.

5. It was only at the discussion of jury instructions, which occurred after the close of the testimony at trial that the prosecutor informed petitioner that he would seek instructions on both theories of first-degree murder. Petitioner objected to the felony-murder instruction voicing concerns based on the decision in *Memro I.* (RT 2727).

6. Petitioner and his attorney on retrial reasonably relied upon the decision of the trial court on the felony-murder special circumstance, the manner in which the case was

briefed (as one in which felony-murder was no longer an issue), and lack of adequate notice to the contrary to conclude that respondent would not rely upon a felony-murder theory of first-degree murder on retrial.

7. After his first appeal, petitioner legally could have been forced to stand trial again on, at most, only one theory of first-degree murder as to Count III. In this circumstance, it was incumbent on the prosecutor was required to give fair notice of what theory would provide the basis for his case. Instead, the prosecutor made no attempt to have the charges better defined.

8. If anything, the prosecutor improperly led petitioner to the false belief that the felony-murder theory on this count had been legally and practically abandoned. The prosecutor voiced no objection to the court's initial instructions to the jury telling them that they would have to find a specific intent to kill to support a conviction of first- degree murder. (RT 2275). It was only after the conclusion of testimony that the prosecutor presented his instructions on felony-murder. Moreover, the prosecutor successfully fought petitioner's attempt to have the jury polled on this very issue.

9. The prosecutor was required by the procedural status of this case to provide petitioner clear notice of his theory of first-degree murder. Failure to do so violated petitioner's Sixth and Eighth Amendment rights to notice and mandates reversal of Count III and the sentence of death.

10. As a result of the above, both petitioner's guilt and penalty phase trials and sentence of death were fundamentally unfair and in denial of his Sixth, Eighth and Fourteenth Amendment rights.

CLAIM 71: The Prosecutor Committed Misconduct in Violation of Petitioner's Constitutional Rights in Failing to Disclose Impeachment Evidence Regarding Jailhouse Snitch Anthony Cornejo.

1. Petitioner brought a motion to suppress his purported confession on the ground that it was involuntary. At that hearing, the prosecutor called jailhouse snitch

Anthony Cornejo to testify. Cornejo gave false, but damaging testimony when he testified that petitioner told him that: 1) the confession was voluntary; 2) petitioner was fabricating the accusation that the confession was coerced; and 3) suppressing the confession was petitioner's only hope of defending himself.

2. Trial counsel rendered ineffective assistance of counsel by failing to impeach Cornejo.

3. During the brief cross-examination, trial counsel asked Cornejo about his felony convictions and about his role as an informant. Cornejo admitted he was a jailhouse "snitch" who had given testimony in the past on several cases, and was frequently held in the "snitch tank" at the Los Angeles County Jail. See Reporter's Transcript on Appeal, *People v. Memro*, dated 10/16/87, pages 993 - 1006.

4. The District Attorney's Office had in its possession documents which fully undermined Cornejo's credibility as a witness.

5. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady* . . . [citation]), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles v. Whitley,* 514 U.S. at 437; *Banks v. Dretke,* 540 U.S. ___, 124 S.Ct. 1256 (2004); *Carriger v. Stewart* 132 F.3d 463, 479-480 (9th Cir. 1997).

6. This duty to learn of, and disclose, favorable evidence to the defense, includes not just evidence in the prosecutor's possession but also such evidence "known to the others acting on the goverment's behalf" (*In Re Brown,* 17 Cal.4th at 879), or known to investigative or custodial agencies to which the prosecutor has reasonable access, (*People v. Kasim,* 56 Cal.App.4th at 1380, citing, *inter alia, People v. Robinson*, 131 Cal.App.4th 494, 499 (1995); *Pitchess v. Superior Court,* 11 Cal.3d 531, 535 (1974)), including

prison records (*Carriger v. Stewart,* 132 F.3d at 479-480)).

7. The prosecutor cannot avoid finding out what the "state" knows, by keeping itself in ignorance or by declining to make reasonable inquiry of those in position to have relevant knowledge. *In Re Brown,* 17 Cal.4th at 879, fn. 3 (*citing Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) and *United States v. Osorio,* 929 F.2d 753, 761 (1st Cir. 1991). Thus, a "*prosecutor cannot adopt a practice of see-no-evil and hear-no-evil. . . .*," particularly where the prosecutor knows the informant witness has obtained benefits for prior cooperation with law enforcement. *People v. Kasim,* 56 Cal.App.4th at 1386.

8. Here, the prosecutor had "reasonable access" to his own office, as well as Los Angeles-area law enforcement officers who had used Cornejo for information in the past. Furthermore, it remains the law that a court may order that a local prosecutor provide even *state wide discovery*, where the data sought may be compiled from information readily available to the district attorney. *People v. Coyer*, 142 Cal.App.3d 839, 842-843 (1983).

9. Notably, this Court has re-affirmed the principle that district attorneys represent the State of California -- and act as State officers when preparing to prosecute and prosecuting violations of State law -- not just the County in which the case is brought. Furthermore, all California district attorneys are directly supervised by the Attorney General in all matters pertaining to the duties of their office. *Pitts v. County of Kern*, 17 Cal.4th 340, 357 (1998), citing *inter alia* Cal. Con., art. V, § 13.

10. Furthermore, even apart from the foregoing, prior to trial here, the trial court issued discovery orders to nearly all the state agencies which possessed the information which was suppressed at trial, but which has emerged during the instant habeas corpus proceedings.

11. The nondisclosure of favorable evidence is a violation of the due process clause of the Fourteenth Amendment. The Supreme Court held in *Brady v. Maryland*, 373

U.S. 83, 87 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Evidence material to guilt is any evidence that "would tend to exculpate" the accused. *Id.* at 88; *United States v. Span,* 970 F.2d 573, 582-583 (9th Cir. 1992).

12. If the state has knowledge of material evidence favorable to a defendant on a question of guilt or punishment, the Fourteenth Amendment requires disclosure of that evidence even *absent* a request. *Brady*, 373 U.S. 83; *United States v. Agurs,* 427 U.S. 97, 112 (1976); *California v. Trombetta*, 467 U.S. 479, 480, 485 (1984). Disclosure is required of all such material evidence, whether or not that evidence would be admissible at the defendant's trial.

13. The obligation of disclosure under *Brady* extends to evidence that might be valuable in impeaching government witnesses. *Bagley,* 473 U.S. at 676 (citing *Giglio v. United States,* at 154) (government failed to disclose promise made to witness that he would not be prosecuted if he testified for the government); *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (prosecution must disclose favorable evidence when disclosure would help the defendant); *see also, United States v. Strifler*, 851 F.2d 1197, 1201 (9th Cir.1988). If the prosecution witness is a police informant, the fact that he has previously offered to testify against other defendants in return for consideration, or has previously made false accusations, is material evidence relevant to the witness' bias, interest and motive, which might cause him to testify falsely.

14. Impeachment evidence falls within *Brady* because "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. Under *Bagley,* undisclosed evidence is material " if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient

to undermine confidence in the outcome. *Id.* at 682.

15. The prosecutor also presented false testimony through Anthony Cornejo regarding the alleged confession made by Mr. Reno to Cornejo. A prosecutor's knowing presentation of false testimony is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). A due process violation occurs when a prosecutor fails to correct testimony he knows to be false, (*Alcorta v. Texas,* 355 U.S. 28 (1957)), even when the falsehood in the testimony goes solely to the witness's credibility. *Napue v. Illinois,* 360 U.S. 264 (1959); *see also Giglio v. United States,* 405 U.S. 150 (1972) (new trial required when government witness testified falsely on matters relating to credibility and the prosecutor who served as trial counsel should have been aware of the falsehood).

16. The failure to fully disclose evidence regarding Anthony Cornejo and the presentation of false testimony violated petitioner's Due Process rights under the Fifth and Fourteenth Amendments, petitioner's right to heightened capital case reliability under the Eighth Amendment and rendered trial counsel ineffective under the Sixth Amendment. All the non-disclosed information is material in each instance, and collectively, in that it raises the possibility of acquittal, and undermines confidence in the verdict, mandating reversal. *See Kyles,* 514 U.S. at 434-435; *Banks*, 124 S.Ct. 1256.

17. Because the errors here were deliberate and egregious, and include a pattern of prosecutorial misconduct, reversal is automatic. *Brecht v. Abrahamson,* 507 U.S. at 638, fn. 9. Reversal is also mandated, as the judgment here was entirely "swayed by the error," *Kotteakos v. United States,* 328 U.S. at 765, and the error had substantial and injurious effect or influence in determining the jury's verdict, resulting in actual prejudice. *Brecht v. Abrahamson,* 507 U.S. at 623, 637, quoting *Kotteakos,* 328 U.S. at 776.

18. Prior to his testimony in this case, Cornejo was a jailhouse snitch in several cases. In the first case where he testified, he committed perjury. He was used very

infrequently thereafter as the Los Angeles District Attorney's Office discovered he was unreliable. Memoranda that circulated in the District Attorney's Office between 1980 and 1990 unequivocally stated that Cornejo could not be trusted as an informant.

19. Anthony Cornejo testified in *People v. Ash* in late 1979. After he testified at trial, Cornejo's co-informant William Schenley admitted to Deputy District Attorney Stephen Kay that he fed Cornejo information about Ash so that Cornejo could also testify.

20. Cornejo and Schenley were handcuffed together on the bus. Ash was sitting in the aisle seat across the aisle from Schenley. Ash and Schenley engaged in a conversation and Ash allegedly confessed to Schenley. Throughout the conversation, Cornejo would jerk Schenley over to his side to ask what was being said, as he was sitting too far to hear. When the two returned to the jail, Schenley told Cornejo everything he had learned so that Cornejo could call a DDA and try to negotiate a deal in exchange for his testimony. Exhibit F, Memorandum from Stephen Kay to Stephen Trott, dated 12/3/80.

21. Kay asked that a perjury investigation be launched against Cornejo. Cornejo refused to discuss the perjury allegation, though he added that he might reconsider "if someone would paint me a brighter picture." Exhibit G, Investigator's Report by Frank Kovacevich, 3/22/81.

22. Cornejo offered to testify in *People v. Bittaker* in 1980. He was not used at trial because of his perjury in the *Ash* case. After hearing Schenley's admission, DDA Kay investigated Cornejo's reliability before putting him on the stand in *Bittaker*. Kay concluded that "Cornejo is without a doubt one of the most unscrupulous snitches that I have ever run across in 14 years as a deputy district attorney." Exhibit F, Memorandum from Stephen Kay to Billy D. Webb, dated 6/1/82. Cornejo was prepared to testify that Bittaker had described the rape-murder of one of the five girls Bittaker was accused of killing.

23. Cornejo later admitted that DDA Rudolph and Sergeant Pailett approached

the informants in the "snitch tank" with a plan to obtain information from Lawrence Bittaker. He admitted that he was given copies of the reports and orally briefed about the case in order to gain more specific information. When Bittaker refused to divulge any information, the inmates were told to develop a "script" that they could agree to and testify to at trial. The script was written by William Schenly, a convicted perjurer and Cornejo's co-informant from the *Ash* case.

24. In *People v. Douglas*, in 1979, the prosecution chose not to call Cornejo because they found him to be completely lacking in credibility. DDA Saukkola interviewed Cornejo to determine his credibility and "found Cornejo not credible at all. Cornejo was in on federal bank robbery charges and Saukkola wrote a letter to Cornejo's attorney stating that he had not used Cornejo, did not intend to and did not find him credible." Exhibit H, Memorandum from Law Clerk Kathy Cady to the file, through Stephen Kay, dated 1/24/89.

25. Cornejo contacted DDA Darden in *People v. Lee* to report a confession he claimed he obtained from the defendant. An investigator interviewed Cornejo and Cornejo agreed to give a written statement. Cornejo told the investigators that he met the defendant in the court returnee cell at the Sheriff's inmate reception center. Cornejo said that the defendant asked him if he knew inmate Fred McCord. When Cornejo told Lee that he did, Lee threatened to firebomb McCord's girlfriend and family "the same way I firebombed that house with the lady . . . and baby . . ."

26. At the conclusion of the interview Cornejo refused to give a written statement. Investigators contacted the inmate reception area and were told that there was no record of Lee being sent to court that day. The prosecutor ultimately chose not to call Cornejo because an "investigation conducted by this office revealed that Cornejo was a liar and could not be considered credible." Exhibit I, Memorandum from Christopher Darden to Hecht, 1/26/89.

27. In March of 1987, an officer admitted that he placed a suspect in the "snitch

tank" in order to extract a confession. Four snitches allegedly obtained that confession, including Anthony Cornejo. "The only evidence establishing the [Defendant's] guilt was a 'jailhouse snitch' confession. The officer testified that he placed the [defendant] in the snitch tank for the express purpose of obtaining a confession." Exhibit J, *People v. Daniels* Disposition Report by DDA Seldeen, dated 3/17/87. The court held that this violated the defendant's Sixth Amendment rights and dismissed the case.

28. During cross-examination in this case, Cornejo was asked to list all cases in which he had previously testified as a jailhouse informant or expected to testify in the near future. (RT 993-1006). An investigation into these cases by law clerks revealed that several of the cases that Cornejo listed were false in that he had not testified. Cornejo claimed to have testified in *People v. Figueroa*. DDA Frank Sunsedt told the law clerk that he knew Cornejo from having prosecuted him in a separate case and was sure that Cornejo never testified against Figueroa, though he noted that Cornejo might have offered to provide information.

29. Cornejo claimed he expected to be called to testify in *People v. Mercurio Garcia*. A law clerk reviewing the file during the informant scandal was unable to locate the case so he called DDA Frank Johnson who prosecuted the case. DDA Johnson said that Cornejo was not used at trial and that DDA Watson who conducted the preliminary hearing did not call him either. Exhibit K, Memorandum from Law Clerk Michael Shultz, dated 3/1/90.

30. In other cases Cornejo listed, the cases were never found and no information either confirming or contradicting Cornejo's claims was found. Exhibit K, Memorandum from Law Clerk Michael Shultz, dated 3/14/90. The case of *People v. Michael Montona* was never located so the law clerk was unable to determine whether Cornejo actually testified. Exhibit K, Memorandum from Law Clerk Michael Shultz, dated 3/5/90. Cornejo claimed he testified for the US Attorney's Office against Donald Pratt and Christopher

Boyce. No information on either of these cases was located. Exhibit K, Memorandum from Law Clerk Michael Shultz, dated 3/5/90.

31. Reversal is required when the court determines that "if disclosed and used effectively, the impeachment evidence may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. at 676 (1985); *Bagley v. Lumpkin,* 798 F.2d 1297, 1300 (9th Cir. 1986). The Court's task is to:

> consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case, and to assess that effect in light of the totality of the circumstances. The proper inquiry is an objective one: whether the Government's failure to assist the defense by disclosing information that might have been helpful in conducting cross-examination undermines confidence in the outcome of the trial. . . . The inquiry is not how this or any other judge, as the trier of fact, would subjectively evaluate the evidence. It is, rather, how the absence of the evidence objectively might have affected the outcome of the trial.

Bagley v. Lumpkin, 798 F.2d at 1300-1301. Here, the impeachment evidence was of critical effect, considering that Cornejo's potential testimony determined what defense was presented and what evidence was introduced in support of that defense, because of the potential prejudice if Cornejo's testimony was provided for the jurors.

32. As the Supreme Court held:

> When the "reliability of a given witness may well be determinative of guilt or innocence," non-disclosure of evidence affecting credibility falls within the general rule [of *Brady*]. We do not, however, automatically require a new trial whenever a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . . . A finding of materiality of the evidence is required under *Brady*. . . . A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ."

Giglio v. United States, 405 U.S. at 154; *United States v. Bagley*, 473 U.S. at 677.

33. Cornejo's testimony against petitioner was substantial and material. It provided the only substantial evidence that petitioner's purported confessions were voluntary. The confession was virtually the only evidence of petitioner's guilt in the 1976 killings and the primary evidence of his guilt in the Carter killing.

34. There can be no question but that the disclosure of the information about Cornejo including his sordid history as a lying and manipulative snitch, would have been critical in cross-examining him. As such, the "confidence in the outcome of the trial is clearly undermined." It is at least reasonably likely that Cornejo would have been disbelieved had he been properly impeached. Indeed, a verdict was reached only after a re-reading of Cornejo's testimony during deliberation. It cannot be said that the outcome of petitioner's trial might not have been more favorable to petitioner.

2. GUILT PHASE ARGUMENT.

CLAIM 72: The Prosecutor Committed Misconduct By Misstating the Law During Argument.

1. During his argument to the jury, the prosecutor argued his theory of the Penal Code §288 charge. He defined Penal Code §288 as "any touching, outer clothing, on the body with the intent to arouse your own sexual desires," and then related that definition to the facts as described in the purported confession:

> so at the moment he touched this young boy, the moment he put that clothesline around him, in addition to probably thinking of wanting to kill him, he has some sexual desire of his own . . . it's uncontroverted he's seven. And that the act was committed with the specific intent to arouse, appeal to, gratify the lusts, passions or sexual desires of such person or the child.

(RT 2847).

2. This "explanation" of the law to the jury was both wrong and misleading. At that time, California courts had not adopted the 'any touching rule' described by the prosecutor. The touching in a charge of lewd and lascivious conduct with a minor required a lewd touching, not merely any touching. Touching the victim with a clothesline as contemplated by the prosecutor was not a "lewd" touching.

3. The applicable law regarding lewd touching was discussed in *People v. Webb*, 158 Cal. App. 2d 537 (1958):

> Placing one's arm around the shoulder of a boy under the circumstances present in this case cannot be said to be lustful, immoral, seductive or

> degrading. The act took place in broad daylight before defendant and the boy had withdrawn to the privacy of the bungalow. Such a casual act would not be considered so unnatural as to invite the scrutiny of even the most suspicious mind. It is inconceivable that any court would convict a man of a violation of section 288 upon the mere proof of an act such as this.

4. Other cases confirmed that *Webb* required that the touching itself must be sexual in nature, though the genitals themselves need not be touched. "It has long been held that a 'lewd or lascivious act' within the meaning of section 288 is not confined to genital touching. Nevertheless, the touching must be lewd." *People v. Gaglione*, 26 Cal. App. 4th 1291 (1994) (citations omitted). "A lewd or lascivious act is defined as any touching of the body of a child which to an *objectively reasonable person* is sexually indecent or tends to arouse sexual desire. . . . In sum, it is a sexual act." *People v. Wallace*, 11 Cal. App. 4th 568 (1992) (citations omitted). A lewd or lascivious act is one which is sexually unchaste or licentious, suggestive of or tending to moral looseness, inciting to sensual desire or imagination, inclined to lechery, or tending to arouse sexual desire. *People v. Pitts,* 223 Cal.App.3d 606, 887 (1990).

5. The prosecutor argued that the jury could eliminate the requirement that the touching had to be "lewd" in order to satisfy the elements of § 288. The prosecutor told the jury that any touching was sufficient, regardless of whether it was lewd. While the prosecutor's argument that lewd intent was required, the prosecutor's elimination of the lewd touching was erroneous and effectively eliminated an element from the jury's consideration.

6. Taken together, the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to Due Process indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also Sullivan v. Louisiana,* 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon

proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). In *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000), the Court explained "As we made clear in *Winship*, the 'reasonable doubt' requirement 'has a vital role in our criminal procedure for cogent reasons.'"

7. It is critical that the jury be allowed to consider all elements of the charged crimes. *See, e.g., Neder v. United States*, 527 U.S. 1 (1999); *Yates v. Evatt*, 500 U.S. 391 (1991); *Carella v. California*, 491 U.S. 263 (1989) (*per curiam*); *Pope v. Illinois*, 481 U.S. 497 (1987). The prosecutor's arguments told the jury to do the exact opposite. The net effect of the prosecutor's argument was to lessen the burden of proof below that of beyond a reasonable doubt. *See, e.g., Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Sandstrom v. Montana,* 442 U.S. 510 (1979), *Patterson v. New York,* 432 U.S. 197, 214-215 (1977).

8. The prosecutor's argument violated petitioner's Sixth Amendment right to have all necessary elements determined by the jury, as well as his Due Process right under the Fifth and Fourteenth Amendments and heightened capital case scrutiny under the Eighth Amendment.

CLAIM 73: The Prosecutor Committed Prejudicial Misconduct During the Guilt Phase by Commenting on Petitioner's Failure to Testify.

1. "[I]n the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-321 (1959).

2. The methods used by prosecutor Millett to obtain a death sentence were reprehensible and requires reversal of the guilt and penalty phase verdicts. Misconduct in argument, such as committed here, alone may be grounds for reversing a conviction. *See, e.g., Berger v. United States,* 295 U.S. 78, 85-88 (1935).

3. A prosecutor, while an advocate, is also a public servant "whose interest,

therefore, in a criminal prosecution is not that [she] shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. at 88. It is the duty of a prosecutor not only to convict but to seek justice. See A.B.A. Standards for Criminal Justice, 2d Ed. (1982) §§3-1.1(b)(c); A.B.A. Code of Professional Responsibility. (E C 7-3; *see also Berger*, 295 U.S. at 88. She has a responsibility to guard the rights of the accused as well as those of society at large. A.B.A. Standards, §§3-5.8(c)(d). This is so because "society wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. 83.

4. The prosecutor is generally viewed with special regard by the jury. *People v. Bolton,* 23 Cal.3d 208, 213 (1979). "[T]he prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." *Brooks v. Kemp*, 762 F.2d 1383, 1399 (11th Cir. 1985)(*en banc)*. A criminal conviction must be reversed if the actions of the prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

5. Here, during closing argument, the prosecutor made the following statement:

> Why doesn't **he** tell us about his friend that the police are looking for? Now, according to most of these articles, very prominent in the whole thing is that there were these two people at this park. Now why doesn't he tell us about his pal who presumably got away?

(RT 2794; emphasis added).

6. This comment was directed not only generally toward petitioner's failure to testify but was specifically designed to undermine the strongest piece of evidence against petitioner's direct participation in the homicides: the fact that someone else not matching petitioner's description had been seen with Fowler and Chavez on the night of the killings.

7. The prosecutor improperly violated petitioner's right not to testify at trial. The prosecutor argued:

> Now if you take– if you take those things as facts, then everything fits almost exactly with the one thing that **Mr. Memro has never mentioned**, the other

person.

> Now only **he** knows why **he** did that. Maybe it's because somewhere down in his inner core of him, wherever that is, says maybe I shouldn't give them this one last great witness against me or maybe he's just a friend that he doesn't want to intrude upon, doesn't want to get involved in this thing, and so he just keeps him quiet. I don't know. That's a speculation.

(RT 2844; emphasis added).

8. Besides being utter speculation, the comments violated petitioner's right not to testify. The comments led the jury to believe that it was petitioner's responsibility to testify before the jury and provide them with all details of the crimes. Under the Constitution, petitioner had no such duty. Practically, petitioner also would and could not do so, since he denied being involved in the charged crimes.

9. It is reasonably likely that the jury found petitioner more culpable based on the misconduct of the prosecutor. While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger,* 295 U.S. at 88. In conjunction with the ineffective assistance of trial counsel in not preventing or remedying this misconduct, the result was a fundamentally unfair trial.

10. The prosecutor's improper argument deprived petitioner of a fair and accurate determination of guilt and penalty in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

CLAIM 74: The Prosecutor Committed Misconduct During Guilt Phase Argument When He Took Advantage of Erroneous Instructions Regarding Count 1.

1. The guilt phase was replete with errors caused by prosecutorial misconduct and exacerbated by the ineffective assistance of trial counsel. The pervasive misconduct and the lack of any significant attempt by trial counsel to stem the tide of wrongdoing resulted in a fundamentally unfair trial requiring reversal of the conviction. The tenor of the trial was determined by the aggressive strength of the prosecutor and the virtual abdication by trial counsel of his role as an advocate.

2. By his stream of misconduct, the prosecutor undermined petitioner's right to present, and have the jury fairly consider, his defense. The pervasive prosecutorial misconduct denied petitioner his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to a fair and reliable determination of guilt in a capital case.

3. Misconduct by a prosecutor in closing argument alone may be grounds for reversing a conviction. *See, e.g., Berger,* 295 U.S. at 85-88. A criminal conviction must be reversed if the actions of the prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986).

4. Here, the prosecutor commented during argument to the jury that:

> Now, as you noticed, second degree murder is the limit that the defendant can be found guilty on as to Count 1. Now that's for a special legal reason that you don't need to concern yourself with, and your instruction says you need not consider yourself with. And it's something that, since you don't need to concern yourself with, you won't be told the reason.

(RT 2783).

5. The instruction given to the jury telling them not to consider the reason why Count 1 was second degree was erroneous because it implied that there had been a prior adjudication, at least as to Count 1.

6. The prosecutor's comments compounded that error and were independent misconduct because they told the jury that the reason why they couldn't consider it was a "special legal reason." (RT 2783). This description was reasonably likely to convey to the jury that petitioner had already been tried once before on these crimes. The subject of retrial was not a proper fact to put before the jury and it was misconduct to do so.

7. The prosecutor further exacerbated this misconduct by stating:

> And what you might be tempted to do– and I certainly hope that you don't, because you shouldn't– is you might take a look at Count 2 and see that in a general kind of way it's rather similar to Count 1, therefore, it must be a second degree murder. It's the murder the cutting of the throat of a young boy fishing in a park, and it's something that occurred only a few moments

apart. However, legally those two crimes are very different.
(RT 2784).

8. The jury should have been allowed to do precisely what the prosecutor forbade them to do– conclude that since, as a matter of law, Count 1 was a second-degree murder, Counts 2 and 3 were also second-degree murder. The prosecutor's remark that "legally those two crimes are very different" further misled the jury.

9. It was also particularly misleading, since according to the instructions and the prosecutor, the jury was not to consider the legal reason why the crime was a second-degree murder. The prosecutor was thus able to argue, based on this erroneous instruction, that a secret legal rationale existed which rendered Count 1 second-degree, but also determined that Counts 2 and 3 were "legally" very different. The prosecutor should not have commented in this manner about something which the trial court and the prosecutor said the jury should not consider.

10. It was constitutional error to give this instruction. The prosecutor took advantage of this instruction and applied it in a manner which further violated petitioner's right to Due Process. The resulting conviction and sentence violate petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights.

CLAIM 75: The Prosecutor Committed Misconduct by Commenting on Petitioner's Sexuality and Potential Punishment.

1. The prosecution already inflamed the passions of the jury by introducing irrelevant and grossly prejudicial pornographic material. The prosecutor further exacerbated the prejudicial effect of petitioner's sexual orientation in his closing argument. Mocking petitioner as if he were musing before killing the victims, the prosecutor argued:

> Well, let's see. If I kill this young boy, what will happen? They'll probably send me to prison, but that won't be so bad. They'll feed me and take care of me, and it will be a lot of security. [¶] And since I don't like – I have no interest in women anyway, that part of it won't be so bad.

(RT 2786).

2. These remarks implied that petitioner should not be sent to prison because, due to his homosexuality, he would consider it a harsh punishment. This argument was particularly improper since, in the guilt phase, the prosecutor should not have commented on potential sentences.

3. The prosecutor continued, speculating about what petitioner thought:

> My income tax will be a lot less. I won't have to buy clothes and so on. And all things on balance, that sounds pretty good. That's the worst that's going to happen to me.

(RT 2786).

4. These statements by the prosecutor were irrelevant at the guilt phase. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154 (1994); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Barclay v. Florida*, 463 U.S. 939, 948-951 (1983).

5. The Due Process Clause of the Fourteenth Amendment prohibits the criminal conviction of any person "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970).

6. The prosecutor sought to convict petitioner not based on the evidence presented at trial, but on inflammatory and improper comments regarding petitioner's lifestyle. The inflammatory remarks during the prosecutor's closing argument were highly improper because "[p]rosecutors may not make comments calculated to arouse the passions or prejudices of the jury." *United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999). These comments were improper and require reversal.

CLAIM 76: The Prosecutor Committed Misconduct by Arguing Erroneous Definitions of Second Degree Murder.

1. The prosecutor, while an advocate, is also a public servant "whose interest, therefore, in a criminal prosecution is not that [she] shall win a case, but that justice shall

be done." *Berger*, 295 U.S. at 88. The prosecutor is viewed with special regard by the jury. *People v. Bolton,* 23 Cal.3d 208, 213 (1979)). "[T]he prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." *Brooks,* 762 F.2d at 1399.

2. A criminal conviction must be reversed if the actions of the prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986).

3. Here, the prosecutor commented that:

> Now, there are a couple of definitions of second degree murder. One is the unpremeditated killing of another person, and that's one theory. The other theory is any act– any act done for wanton, antisocial, base purpose and so on. I think either one of those things fit those facts, and I think it should just take you a moment or two to agree that the second degree murder charge that is charged against Mr. Memro is appropriate.

(RT 2785).

4. By arguing both theories, the prosecutor was able to effectively eliminate the element of intent to kill required for second-degree murder.

5. The prosecutor's argument was that, if petitioner performed one or more of the killings, even if premeditation or deliberation was lacking, petitioner was guilty of second-degree murder on one of two theories. Either, as an intentional killing or as a killing resulting from an intentional act, with reckless disregard for the fact that death was likely to result.

6. This argument, however, eliminated the intent requirement from second-degree murder. There was no evidence, that whoever killed the victims had anything other than the intent to kill. The reckless indifference theory is appropriate when a defendant commits an act without the specific intent to kill, but with reckless indifference to the certainty that death will result.

7. To argue that reckless indifference second-degree murder was, in effect, removing the intent requirement. Whoever killed the victims either intended to kill, or did

not form any intent to do it due to diminished capacity/actuality or insanity. Reckless second-degree murder was not designed to encompass situations such as this. There was no evidence that these crimes were accidental, or otherwise lacking in intent. Hence, it was improper to expand the scope of second-degree murder in this way. This argument violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

CLAIM 77: The Prosecutor Committed Misconduct by Arguing Two Theories of First-Degree Murder in Count 3, in Violation of Double Jeopardy Principles.

1. The prosecutor improperly argued two theories of first-degree murder regarding Count III, despite the fact that in the first trial the judge found the felony murder special circumstance to be untrue. This argument deliberately violated petitioner's rights not to be placed in double jeopardy.

2. The prosecutor stated:

> Now, as to Count 3, the murder of Carl Carter, Jr., there are two theories. One is it could be a willful, deliberate, premeditated murder, or it could be a murder that occurred during the course of a felony. The felony– during the course of attempted felony or a completed felony– that of child molest.

(RT 2786).

3. The prosecutor, after summarizing the evidence from petitioner's purported confession, stated:

> Well, I think if you think about it, and considering that he taped his hands behind his back– anybody here believe he did that after he was dead? These things didn't happen exactly the way Mr. Memro has stated it. These happened more than likely while he was attempting some sort of a child molest, some sort of a sexual advance or attack on this boy.
> Either that happened or because he already knew that he had killed two other boys 27 months earlier and had gotten away with it, that the same thing could happen this time.

(RT 2789).

These comments demonstrate that the prosecutor actively sought to try petitioner based on both theories of first-degree murder, despite petitioner's acquittal of the felony-murder

special circumstance.

4. He further argued both theories when he stated:

> He had had some sexual relations with this young boy. He couldn't possibly let him go back and tell his father or anyone else. And there was only one thing left to do then, and he took that clothesline and, as he described. tied it in a square knot, something that presumably he remembers, and choked him to death.

(RT 2789).

5. Any ambiguity in whether he argued both theories was removed when he stated:

> So he intended to kill. It was willful. It was deliberate. It was premeditated, and it was in the commission of a felony, that is, to commit a child molest.

(RT 2789-90).

6. The prosecutor exacerbated this misconduct by arguing for a lesser burden of proof required to convict petitioner of first-degree murder in Count III. The prosecutor explained to the jury that it need not agree as to their theory:

> Now, you received an instruction that you don't have to unanimously agree among yourselves as to the theory to find someone guilty of first degree murder. And this is an instruction that is specially apt as to Count 3, because I would imagine some of you are more comfortable believing that it happened during the course of a felony and some of you may be more comfortable believing that it was a willful, deliberate and premeditated murder. If six of you feel one way and six feel the other, that's first degree murder.

(RT 2790).

One of these theories of murder was necessarily rejected by the trier of fact in the first trial. To argue an inapplicable theory to the jury, and to encourage the jury to so find, impermissibly lowered the prosecutor's burden of proof below a unanimous finding of all jurors beyond a reasonable doubt.

7. When concluding his initial argument, the prosecutor argued:

> It's a first degree murder as to the little Carter boy, either on a willful, deliberate, premeditated murder or on the felony murder rule.

(RT 2795).

8. In rebuttal, the prosecutor argued:

> Does anybody have any doubt that Carl Carter, Jr. was in the process of being molested? I don't think so.

(RT 2845). The prosecutor still clung to both theories.

9. The prosecutor also misapplied the law in arguing that the Carter killing was first degree under a felony-murder theory:

> Lewd act with a child. Every person who willfully and lewdly commits and lewd or lascivious act upon or with the body or any part of member thereof with the child under the age of 14 years with the specific intent of arousing, appealing to or gratifying the lusts or passions or sexual desires of such person or of such child is guilty of the crime of committing lewd act or lascivious act upon the body of a child.
>
> A lewd or lascivious act is defined as any touching of the body of a person under the age of 14 years with the specific intent to arouse, appeal to or gratify the sexual desires of either party. To constitute a lewd or lascivious act it is not necessary that the bare skin be touched. The touching may be through the clothing of the child. The law does not require as an essential element of the crime that the lusts, passions or sexual desires of either such persons be actually aroused, appealed to or gratified.
>
> In order to prove commission of a crime of a lewd or lascivious act upon the body of a child each of the following elements must be proved, one, that a person committed a lewd or lascivious act upon the body of a child. Now, as that definition just– or as that was just defined a few minutes later, that means any touching, outer clothing, on the body with the intent to arouse your own sexual desires.
>
> Now, Mr. Memro said that he wanted to bring the kid in there to take some nude photographs. And if you recall essentially his whole statement is when apparently Ralph, Jr., wasn't going to go for this or whatever, he said he had to get home early, that made him so mad that he grabbed this clothesline and choked him. Presumably choked him to death at that time, put him on the bed. And what did he immediately do? He rips his own clothes off, the child's clothes off, and as he says tries to screw him in the ass.
>
> Well, what in the world is in Harold Memro's mind then at the time he touches that child? I mean, is this some urge that came on him after he choked him to death? Well, I certainly wouldn't think so. As, at the moment he touched this young boy, the moment he put that clothesline around him, in addition to probably thinking of wanting to kill him, he has some sexual desire of his own. And I don't know what could be a more dramatic example of that than what he just proceeds to do afterwards.
> The other element is that the child be under 14 years of age. It's uncontroverted he's seven And that the act was committed with the specific intent to arouse, appeal to, gratify the lusts, passions or sexual desires of

such person or of the child. And obviously it was to satisfy the sexual desires of Mr. Memro.

(RT 2846-47).

10. These comments unconstitutionally misstated the law regarding lewd and lascivious acts, changing the elements of the offense charged. The prosecutor greatly expanded acts which would be criminal under the statute. Considering that the trial court in the first trial found the felony-murder special circumstance untrue, the misconduct was particularly prejudicial.

11. The prosecutor returned to this theory when he stated:

> Now, back to Count 3 the Carl Carter, Jr., situation. I believe I left at the lunch break I was talking about you could believe everything that Mr. Memro says through the testimony of Lloyd Carter as to the murder of Carl Carter, Jr., and still come to the conclusion that this is a murder in the course of a child molest.
>
> Now, I think that some of you will come to that conclusion, and if you want to use your common sense as I had indicated earlier, use it a little more and decide what did happen. Again, I think that you'd come to the conclusion that certainly things didn't happen in the order that Mr. Memro says. It's so unlikely that when the boy wanted to go home that that made him so angry that he decided to kill him, and he did kill him; and then after that suddenly some overwhelming sexual desire comes over him, and he attempts anal intercourse with him at that particular time. Obviously what must have really happened is the deed was accomplished first, and he now was faced with the possibility and the problem of what in the world to do about it. He certainly couldn't have little Carl Carter, Jr., going home in tears and probably injured and telling his parents what Mr. Memro had done to him. And Mr. Memro remembers doubtless how he handled that situation in the past, and he did it again.

(RT 2850-51).

The prosecutor again argued that petitioner was guilty of both premeditated and deliberated intentional murder and felony-murder. The problem is that the felony-murder theory was necessarily ruled out at the first trial. It violated the prohibition against double jeopardy to try him on both of these theories twice.

12. The prosecutor stressed the felony-murder theory, even though it had already been ruled out:

> It was said that we don't have to be concerned with anything that Dr. Choi had to say. He's neutral. I don't think that's quite true. I think what Dr. Choi had to say regarding especially the phosphatase test, I think, goes a long way toward refuting Mr. Memro's statement that he was, as he puts it, unable to get a hard on.

(RT 2851).

13. As discussed herein, it violated double jeopardy principles to try petitioner on both theories, one of which was rejected at the first trial. The prosecutor's argument violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

CLAIM 78: The Prosecutor Committed Misconduct by Unconstitutionally Shifting the Burden of Proof Onto Petitioner and His Trial Attorney.

1. The prosecutor's closing argument unconstitutionally shifted the burden of proof onto petitioner. This argument violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

2. The prosecutor argued:

> Now, there's no evidence in this case anywhere that suggests that these crimes are anything other than what I've suggested. If there is, I hope and I assume that Mr. Larkin will tell you what they are.

(RT 2791).

3. The prosecutor has the burden of proving its case beyond a reasonable doubt, including proving all elements of the crime beyond a reasonable doubt. Petitioner's trial counsel was not required to demonstrate the contrary.

4. The prosecutor continued trying to shift the burden of proof onto petitioner when he stated:

> There's also nothing in the evidence to explain to us why in the world Mr. Memro would want to confess to these crimes if he hadn't done them.

(RT 2793).

Petitioner was not obligated to explain any evidence. It was solely the state's burden to prove it's theory of the crime.

5. The prosecutor consistently maintained that the defense had to present a theory which logically explained all the evidence:

> Now, the theory– I assume the defense theory is that for some reason he wanted to falsely confess to this crime and he wanted to do it properly. He didn't want to be caught in any lies or anything for some reason, otherwise who would be prosecuting him for these murders which he apparently wanted? And if there's a reason for that, perhaps we'll hear it from the defense. I don't know what it is.

(RT 2794).

6. Most damning, the prosecutor stated:

> Why doesn't **he** tell us about his friend that the police are looking for? Now, according to most of these articles, very prominent in the whole thing is that there were these two people at this park. Now why doesn't **he** tell us about his pal who presumably got away?

(RT 2794; emphasis added).

The clear intent was that petitioner was obligated to identify the second person at the park.

7. First, placing this requirement onto petitioner was constitutionally impermissible, as a criminal defendant is not required to put forth any evidence. Second, this argument was obviously in bad faith, since the prosecutor knew that petitioner was denying any role in the killings at the park.

8. At the conclusion of his argument, the prosecutor once again shifted the burden onto petitioner's counsel:

> And finally, I'd like to leave you with a thought that I was rather significant. Mr. Larkin tells you there was one witness that came in here in the courtroom, sat up there and looked at Mr. Memro aor something to that effect, not one person said that he's the one I saw out there.
> Now, of course, he looks a lot different. He's clean cut. He's a lot older. And notwithstanding all that, Mr. Larkin wasn't quite confident enough to ask any one of them, was my client out there that night?

(RT 2857). Trial counsel was not required to ask any questions from any witnesses. The fact that he may not have asked a certain question is irrelevant, since under the Constitution, he need not ask any questions at all.

9. The prosecutor's arguments shifted the burden of proof and impermissibly

commented on petitioner's right to remain silent. Under *In re Winship*, the prosecution always has the burden of proof on every element of the charged crimes. These comments violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

CLAIM 79: The Prosecutor Committed Misconduct in Commenting on Retrials.

1. During argument, the prosecutor stated:

> Now, the defense by innuendo, Greene is six foot two and 225 pounds. Now, it's a small point. My recollection is Carter said he was six one and 215. *If we have this trial again in another 10 years*, I'm sure he'll be six foot eight and 290.

(RT 2829; emphasis added).

2. This comment about a potential retrial was completely improper. The concept of a retrial had not been addressed by petitioner's attorney, so the prosecutor was not rebutting any such contentions. The trial court had already ruled that the jury would not be informed of the prior trial.

3. The comments about a retrial unfairly lessened the jury's sense of their duty to decide the case. It unfairly insinuated that their decision would be subject to review and reversal, thus placing irrelevant concepts in their minds during deliberations which could lead to a hasty and ill-considered verdict.

4. This misconduct was exacerbated by the fact that petitioner had previously been tried on these offenses. Due to the length of time between the offenses and purported confessions and the 1987 trial, it is reasonably likely that the jury inferred that petitioner had previously been tried and convicted on all counts. This knowledge lessened the importance of the jury's verdict, due to their perception that another jury had already convicted petitioner of these crimes.

5. By implying that another jury had already convicted petitioner of the charged crimes, the prosecutor lessened the jurors' sense of responsibility. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Darden*, 477 U.S. at 184, n. 15, (1986); *Dugger v.*

Adams, 489 U.S. 401, 407 (1989); *Sawyer v. Smith*, 497 U.S. 227, 233 (1990). This argument violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

3. PENALTY PHASE.

CLAIM 80: The Prosecutor Committed Misconduct by Cross-Examining Petitioner Regarding the Appellate Process.

1. At the end of the penalty phase, petitioner requested, over his attorney's objection, that he be allowed to address the jury. After initially denying the request and stating that to allow the statement would be "participating in judicial suicide" and would be "very offensive" (RT 2967), the court granted the request and stated that Mr. Reno could make the statement from his position at the defense table. (RT 2967). Following his ruling in response to the prosecutor's question of whether Mr. Reno could take the witness stand, the court stated "I'm not going to allow you to cross-examine him." (RT 2968).

2. Petitioner was sworn and made a statement after having been assured by the judge that he would not be subject to cross-examination. (RT 2968). The full statement was as follows:

> I just have a short statement I'd like to read to the jury.
>
> While I do not concede the truth, accuracy or correctness of the jury's verdicts, I do feel that since the jury has returned the verdicts of guilt in the maximum degree possible in all counts and the special circumstance, that they should also now return with a verdict of death as the appropriate penalty.

3. After petitioner gave his statement, the prosecutor sought to cross-examine on the grounds that petitioner "has some idea he gets quicker appellate rights if he gets the death penalty." (RT 2969). On this thin reed, the trial court reversed its initial ruling barring cross-examination of petitioner.

4. The improper cross-examination of petitioner following his testimony requesting the death penalty was as follows:

Q. Mr. Memro, it is a fact, isn't it, that you intend to appeal these

convictions?

A. I have no specific intention to be on the automatic and non-waiver appeal in California.

Q. And it's your feeling that you'll get quicker and more direct access to the Supreme Court if you are given the death penalty rather than life without possibility of parole?

A. That's a fact. It goes directly there, yes.

Q. And isn't that the reason that you're making this statement to the jury?

A. No, that is not the reason.

(RT 2970-2971).

5. This cross-examination, on the facts of this case, was wholly outrageous. It invited the jury to infer that the responsibility for imposing the death penalty ultimately lay with the appellate courts, not with the jury. It also invited the jury to punish petitioner for his statutory automatic appeal.

6. The trial court's after-the-fact changed ruling and the prosecutor's line of questioning deprived petitioner of a fundamentally fair penalty proceeding and created an impermissible risk that the death verdict was unreliable, arbitrary and capricious, all in violation of the Sixth, Eighth, and Fourteenth Amendments and the California State Constitutional analogues.

CLAIM 81: The Prosecution did not Provide Adequate Notice of the Evidence it Would Present at the Penalty Phase Under Penal Code § 190.3.

1. No prior act evidence was introduced at the penalty phase of the first trial.

2. The prosecution did not supply notice to the defense regarding the evidence the prosecution would seek to introduce at the second penalty phase.

3. On February 6, 1987, petitioner moved to declare unconstitutional and strike a prior felony conviction as an aggravating factor in anticipation that this felony conviction might be used against petitioner. (CT 294). After a hearing on this motion, the court

granted the motion, declaring the prior felony conviction to be unconstitutional for all purposes. (RT 374). The defense was again led to believe that there would be no use of the prior conviction or the underlying acts once it had been declared unconstitutional by the court.

4. Despite the lack of notice, the prosecution presented at the penalty phase the testimony of a police officer and the alleged victim, David Schroeder, regarding the facts underlying the stricken and unconstitutional felony conviction. (RT 2904). Because of the lack of notice defense counsel asked only one question (whether he still had his clothes on when he lost consciousness) on cross-examination of the complaining witness. (RT 2922).

5. In addition to being a violation of the state statute, the lack of adequate notice denied petitioner his rights to adequately prepare his penalty phase defense and to a fundamentally fair and reliable determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments.

6. Had adequate notice been given, the defense would have been able to obtain the prior testimony of the potential witnesses for use in cross-examination.

7. In particular, Schroeder's testimony at the 1972 preliminary hearing was vastly different from his testimony at the penalty phase.

8. On direct examination at trial, Schroeder testified that he was shown pictures of nudes, was then caressed by petitioner and the next thing that happened was that petitioner choked him and he felt "a blow of some sort." (RT 2920). At the preliminary hearing, there was no mention of caressing.

9. On cross-examination at the preliminary hearing, Schroeder said that he was given a karate shirt to put on over his street clothes. He was standing. According to his testimony:

> Q. That is really basically the last thing that you remember aside from waking up on the bed?

A. Uh-huh.

Q. You are unclear as to how the injury you suffered was actually given to you; is that right?

A. Uh-huh. I don't know how I did—done it.

Q. You could have been standing when you got the injury and woke up in bed?

A. Uh-huh.

Q. Think back in your own mind, David, and tell me whether you suffered any other blow to your head after you went into the bedroom but before you put the karate clothes on.

A. No.

10. In the absence of serious cross-examination of Schroeder as to the inconsistencies in his testimony, the jury was led to believe that the Schroeder incident necessarily involved sexual approaches followed by a violent attack. There was in essence a concession of the truth of the allegations because of the lack of preparation to meet this evidence or any attempt to counter it.

11. The prosecution relied heavily on this prior act as the basis for the imposition of a death sentence, closing his argument to the jury with the comment that Schroeder was the luckiest man in the courtroom. (RT 2977, 2983).

12. Due process and Eighth Amendment capital case scrutiny prohibit trial by ambush. *See, e.g., Lankford v. Idaho,* 500 U.S. 110, 127 (1991); *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *United States v. Chenaur*, 552 F.2d 294 (9th Cir. 1977).

13. As a result of the above, petitioner's penalty phase trial and sentence to death were fundamentally unfair and in denial of his Sixth, Eighth and Fourteenth Amendment rights.

4. PENALTY PHASE ARGUMENT.

CLAIM 82: The Prosecutor Committed Prosecutorial Misconduct in Penalty Phase Argument.

1. The prosecutor stated, in introducing his penalty phase argument:

> Now, we're in a much different position today than we were back there when we talked to you individually over that long period of time. You've now been convinced beyond a reasonable doubt and to a moral certainty of the guilt of Harold Ray Memro of these offenses.

(RT 2976).

2. This statement was misconduct because he used an improper definition of reasonable doubt. This violated the Due Process Clause. In *Cage v. Louisiana*, 498 U.S. 39 (1990) (*per curiam*) the jurors were told:

> [A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*

Id., at 40 (emphasis in original).

3. The Supreme Court explained why the highlighted portions of the instruction rendered it unconstitutional:

> It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id., at 41; *see also Sandoval v. California*, 511 U.S. 1 (1994); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (finding an unconstitutional reasonable doubt instruction is not subject to harmless error analysis under *Chapman*, but is reversible *per se*); *Cage v. Louisiana*, 498 U.S. 39 (1990); *Estelle v. Williams*, 425 U.S. 501 (1976) ("The

presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); *People v. Freeman*, 8 Cal.4th 450 (1994) (Reasonable doubt instruction not unconstitutional where trial court substituted "mortal evidence" for "moral evidence"; in light of *Victor v. Nebraska,* this Court criticizes definition of reasonable doubt found in California statute and urges revision by Legislature and/or new definition by committee which develops standard jury instructions).

4. It was improper for the prosecutor to argue to the jury based on the concept of "moral certainty," a concept which has been condemned by the Supreme Court. The prosecutor applied erroneous concepts of law in argument and the trial court failed to correct those erroneous instructions. The result was a fundamentally unfair penalty phase, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

CLAIM 83: The Prosecutor Committed Prosecutorial Misconduct in Penalty Phase Argument When He Argued Both the Felony-Murder Theory and the Premeditated and Deliberated Murder Theory.

1. The prosecutor continued his course of prosecutorial misconduct by arguing the felony-murder theory in the penalty phase. The prosecutor stated:

> Several years later, he killed Carl Carter, Jr., pretty much the same way. He used him sexually apparently and then just threw him away.
>
> Now, Mr. Memro believes in the death penalty, too. And he would give – inflict the death penalty on those that crossed him in the most minor ways, that he didn't require a jury. He didn't require these complicated procedures that we go through, but simply if a person were to be a witness against him, that's enough that they're to die.
>
> He couldn't face Carl Carter, Sr., after what he had done to that boy, so it was time for that boy to die and throw him away.

(RT 2980).

2. As discussed above, it was prosecutorial misconduct to try petitioner on both a felony-murder theory and a premeditated and deliberated murder theory, considering the not true finding on the felony-murder special circumstance. To argue both theories again in

the penalty phase rendered the sentence fundamentally unfair.

CLAIM 84: The Prosecutor Committed Prosecutorial Misconduct in Penalty Phase Argument With His Comments About Petitioner's Testimony.

1. The prosecutor made irrelevant and inflammatory arguments during the penalty phase when he stated:

> So he believes in the death penalty. And in fact, he's asked a few minutes ago that you impose it. And he also believes in life without possibility of parole, because he has sentenced all the loved ones of those three boys to life without possibility of parole. Do you suppose there is ever one of their birthdays that goes by that somebody doesn't think of that? Or when the day rolls around that these murders occurred? They have that forever.
>
> Now what is an appropriate punishment for Mr. Memro? I don't know if his statement on the stand is a very clever ploy to cause you to say, whoa, if that's what he really wants, really, really punish him and not give it to him. And one of the things that I'd really ask you to do, and this is a pretty simple statement, but I want you to do the right thing.
>
> Now, I think you can make a mistake in this case. And one is you could decide on your own that life without the possibility of parole is worse than death, but it really isn't. It's legally not worse. The instructions refer to as anything less than death. The only thing less than death in this case is life without possibility of parole.
>
> Mr. Memro says he wants you to give him the death penalty. Maybe he does, and maybe he doesn't. But he has something that he's deprived the victims of, he had a life. Now the quality of life in the state prison is doubtless not the quality of life that you or I live or any of these people in the courtroom live, but it is a life. And if you think that by sentencing him to life without the possibility of parole that you're going to cause him to sit around and contemplate this for the rest of your life, the rest of his life, I think you're going to make a big mistake.
>
> You've observed him in the courtroom, and he seems to be having for the most part a reasonably good time, considering the circumstances.
>
> Sometimes he laughs. Sometimes he's joking with court personnel. He has a life. Scott Fowler doesn't have a life. The Chavez boy doesn't have a life, and neither does Carl Carter, Jr. Death is worse than life.

(RT 2981-82).

2. As discussed above, it was error to cross-examine petitioner about his wishes, the appellate process itself and of his knowledge of the appellate process. The

prosecutor further exacerbated this error by arguing to the jury based on petitioner's purported wishes. Moreover, petitioner's wishes regarding the death penalty were not proper evidence. Argument about them was thus improper.

G. CLAIMS RELATING TO INEFFECTIVE ASSISTANCE OF COUNSEL.

1. INVESTIGATION.

CLAIM 85: Trial Counsel's Failure to Examine Officer Carter's Contemporaneous Notes of the Confession Constituted Ineffective Assistance.

1. At least 11 pages of notes were purportedly prepared on October 27 and 28, 1978, by Sgt. Lloyd Carter of the South Gate Police Department in connection with the arrest and interrogation of petitioner. The notes were certified as "authentic" on February 11, 1982, more than three years after they were purportedly made.

2. Although they were clearly subject to the continuing discovery order, these purported notes were not provided to petitioner or his counsel during discovery at the first trial, and were not available at petitioner's motion to suppress evidence at the second trial. The notes were first made available to petitioner and his counsel at the retrial.

3. The purported interrogation notes are in a narrative form and contain complete sentences. The detail and physical appearance of the notes are inconsistent with contemporaneous interrogation notes. It is reasonably evident that the notes were prepared at sometime after the arrest and interrogation of petitioner. (Exhibit S-B-, Alleged Interrogation notes of Sgt. Lloyd Carter, Exhibit S-B).

4. Sgt. Carter used the purported notes at the second trial allegedly to refresh his recollection and assist him in his testimony. The notes falsely enhanced the appearance of credibility of Sgt. Carter's testimony regarding his recollection of alleged admissions by petitioner.

5. Absent the purported interrogation notes, Sgt. Carter's testimony regarding his recollection of admissions by petitioner would have been less thorough, less credible,

and less convincing. The result of the proceedings would have been more favorable to petitioner on both the questions of guilt and penalty.

6. Trial counsel had no reasonable tactical reason to fail to obtain expert testimony as to the date on which the notes were likely to have been written. Had he obtained such testimony, he would have learned that they were not written contemporaneously with the statements made to Carter by petitioner.

7. The government's reliance on and exploitation of the falsified notes deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

CLAIM 86: Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and Present Evidence Regarding Alternate Suspects.

1. Throughout the police investigation, a multitude of alternate suspects emerged. Trial counsel rendered ineffective assistance of counsel in failing to conduct an independent investigation and present evidence regarding the alternate suspects.

2. **Suspect One**, of whom a composite sketch was created and circulated, had been seen at the park on the night of the killings by witnesses Jose Feliciano, Scott Bushea and Mary Bushea. They all saw Suspect One at the park prior to the night of the murder. Jose Feliciano and Scott Bushea saw both suspects fishing at the park earlier that week. Exhibit S-A, Police Report by Det. Bowers, dated 9/13/76. Audie Cullison was fishing with Scott Fowler on the Wednesday before the murders. Suspect One approached them and asked "how many fish you caught?" He then stood and stared at Scott Fowler for about five minutes before finally walking away. Exhibit S-A, Interview of Jose Feliciano by Det. Gossett, dated 7/26/76. Suspect One was described as having sandy blond, shoulder length hair, with a conspicuous scar across his right cheek and was wearing an army jacket on the night of the killing.

3. The scar was noticeable and played a major role in investigating alternate suspects. Five potential suspects were released because they did not have the requisite scar

on their cheek: Joseph Daniel Arozena (Exhibit S-A, BGPD Police Report by Detective Bower, dated 8/6/76); Donald Johnson (Exhibit S-A, BGPD Police Report by Detective Bower, dated 8/9/76); William Ernest Burley (Exhibit S-A, BGPD Police Report by Detective Rogers, dated 6/6/77); Ralph Wilbur Baker (Exhibit S-A, BGPD Police Report signed by Detective Bower, dated 8/13/76); and Raymond Minick (Exhibit S-A, BGPD Police Report by Detective Bower, dated 9/3/76).

4. Mr. Reno has dark hair and no scars on either cheek. His Booking Slip, dated 10/27/78, stated that no scars were visible. "Marks, scars and deformities: n/v". A 1972 arrest report only lists "Fu Man Chu mustache" under 'marks and scars.'

5. **Suspect Two** was not seen or described as clearly as Suspect One. No composite was ever made of this suspect and the investigation focused primarily on Suspect One. When Jose Feliciano and his friend Scott Bushea were at the park earlier that week they saw both suspects. Suspect Two spoke with Scott Bushea. Exhibit S-A, Police Report by Det. Bowers, dated 9/13/76. Suspect Two was described as having brown, wavy hair, slightly chubby and possibly Hispanic. Suspect Two arrived at the park wearing a brown jacket and riding a motorcycle.

6. **Suspect Charles Michael Lohman aka Charles Paul Trout aka Crazy Charlie**: Shortly after the killing, photographs of potential suspects were shown to the witnesses. Jose Feliciano, the boy who helped create the composite sketch of Suspect One, picked two photographs out of the 14 he was shown. He identified Charles Michael Lohman as the man "he had the picture drawn for the police," and John Helder Arnett Jr. as the other suspect present that night. Exhibit S-A, BGPD Police Report by Detective Rogers, dated 7/21/76. Later into the investigation, Feliciano was hypnotized and asked again to describe the suspects. Feliciano gave a similar description of the suspects, but when asked if he could remember the names of the two men, he responded without hesitation that the man in the composite sketch was named "Chuck", and the man on the

motorcycle was named "Tom." Exhibit S-A, BGPD Police Report by Lt. Curd, dated 8/19/76.

7. Feliciano was re-interviewed later, and again asked if he could recall the names of the two suspects. This time he thought the name of Suspect Two was 'Bob' or 'Bill', but again he told the officers that the name of Suspect One was 'Chuck'. The name 'Chuck' matched Charles Michael Lohman. See also Exhibit S-A, BGPD Police Report by Sgt. Bower, dated 9/9/76.

8. According to the police report, Audie Cullison had seen Suspect One at the park while Cullison was fishing with Scott Fowler early in the week prior to the murder. When officers asked Cullison if he recognized any of the men in the pictures, he immediately identified the picture of Charles Michael Lohman. When asked if he was sure, he responded, "yes, you could not forget that scar once you have seen it." Exhibit S-A, BGPD Police Report by Det. Rogers, dated 9/21/76.

9. On October 3, 1976, Bell Gardens police officers were notified that Charles Lohman was being held in the San Diego County Jail on separate charges. While arresting Lohman, San Diego Sheriff's deputies removed a large, folding buck knife from Lohman's possession. The deputy advised the tow truck driver who was impounding Lohman's vehicle that the vehicle was to be held for a homicide in Los Angeles County. While in the back of the patrol unit, Lohman said, without being prompted by any conversation or comments relating to the homicides in Bell Gardens, that "that murder has probably been reduced to a child molest by now." Detective Rogers responded to the San Diego County Jail to interview Lohman about the murders. Lohman admitted to having been in Bell Gardens at the time of the murders. He denied any involvement. Exhibit S-A, BGPD Continuation Report by Det. Rogers, dated 10/4/76.

10. **Suspect Craig Crowder**: On July 28, 1976, Bell Gardens police officers contacted Jose Feliciano with six additional photographs of suspects who had been detained

due to their likeness to the composite sketch. After about ten minutes, Feliciano said that the photograph of Craig Crowder resembled one of the suspects he saw the night of the murder. Exhibit S-A, BGPD Police Report by Det. Pratt, dated 7/28/76.

11. On August 1, 1976, a Bell Gardens police officer was contacted by an anonymous female who had seen the published composite sketch. She stated that the sketch was of Craig Crowder. She said that Crowder always wore an army jacket, practiced knife throwing and had a brother who owned a yellow dirt bike. The officer felt that the caller was not divulging all she knew. She refused to give her name or address. The police did not investigate further. Exhibit S-A, BGPD Police Report, dated 8/1/76.

12. On July 28, 1976, Craig Crowder was detained after a witness, who was not named but was someone other than Jose Feliciano, identified Crowder as the suspect matching the composite sketch. Crowder denied involvement in the crime. Crowder consented to a search of his residence but nothing relevant was obtained. Despite the fact that the officers agreed that Crowder matched the composite sketch, they released him. No further investigation of Crowder was conducted by law enforcement.

13. **Suspects Donald and Eddie Avon Ledlow**: The Ledlow brothers were neighborhood acquaintances of Scott Fowler. Officers discovered that one of their brothers, Windel, had been stabbed on Scott Fowler's porch only a short time before the murders. Officers focused on the Ledlows in their investigation. Donald Ledlow matched the composite, carried a 12" knife and owned seven different motorcycles, one of which was yellow and generally matched the description of the motorcycle seen at the park the night of the murders.

14. Approximately one month before the Chavez and Fowler killings, Windel Ledlow, who was about 30 years old, was hanging out with some teenagers on Scott Fowler's porch drinking beer and smoking marijuana. Sixteen year old Bobby Davis, who lived across the street from the Fowler house, got into an argument with Windel Ledlow.

As Bobby started to return home, his mother came out of the house to see what was happening. Windel Ledlow called Mrs. Davis a 'Bitch' and struck her. Bobby Davis then emerged from his house with a butcher knife, with which he stabbed Windel in the stomach. Windel climbed into his car with the help of his brothers and was driven to the hospital. In the period after the stabbing, the Ledlow brothers swore vengeance on Bobby Davis, and occasionally came by looking for him. Exhibit S-A, BGPD interview of Vicki Shidale and Christine McNeal by Officers Figueroa and Byal, dated 7/30/76.

15. During a re-interview of Jose Feliciano, Jose tentatively identified Eddie Avon Ledlow as the second suspect who arrived at the park the night of the murder on a motorcycle. He also mentioned that he thought that the two suspects could have been brothers. Exhibit S-A, BGPD Police Report by Dep. Figueroa - LAPD, dated 8/3/76.

16. **Suspects Cynthia and Larry Shamp**: Bell Gardens police received a call from a sheriffs deputy in West Virginia, who had detained Cynthia Shamp for drunk and disorderly conduct stemming from a traffic collision. While searching Shamp's car, the deputies found newspaper clippings from the Bell Gardens Daily Review about the double homicide in Ford Park, which comprised all newspaper articles written about the murder in the first week of investigation.

17. Along with the articles, several letters were found, one of which had been sent by Shamp's mother, who lived in Bell Gardens. The letter told Shamp not to return to the state "because you are hot." Another letter sent from Bell Gardens was signed "your partner in crime."

18. One of the newspaper clippings had a copy of the composite sketch. Across the sketch was written "this is the man that the police are looking for", and was initialed by Shamp's mother. Cynthia's brother, Larry Shamp was known to the Bell Gardens police as he had been arrested before for armed robbery and narcotics violations. He had recently been committed to the Patton State Mental Hospital in San Bernadino. Exhibit S-A, BGPD

Police Report by Det. Apodaca, dated 9/27/76.

19. Detectives Rogers and Apodaca traveled to West Virginia to interview Cynthia Shamp while she was still in custody. Exhibit S-A, Memorandum to Chief Childers, dated 9/21/76. She explained that she could not return to the state because of a narcotics violation, and that her mother sent her the newspaper clippings because she likes to keep apprised of news from Bell Gardens while she is away.

20. **Suspect Edward Fimbres Alvarez**: Shortly after the 1976 killings, Sgt. Carter called the Bell Gardens Police Department with a potential suspect. A man Carter released from jail had called the station saying that while in custody, a fellow inmate named Edward Fimbres Alvarez had told him that one of the victims in Ford park had been cut from armpit to ear.

21. Officers from the Bell Gardens department met Alvarez in an interview room at the South Gate police department, where they interviewed him. The officers told Alvarez that he was a suspect, since information about the second laceration on Scott Fowler had not been released to the public. Alvarez responded that he knew Scott's brother Kenneth Fowler, who had seen photographs. Officers told Alvarez that the second laceration was not depicted in any photographs shown to the family. Exhibit S-A, BGPD Police Report by Det. Gardner, dated 8/7/76. No further investigation into Alvarez was conducted.

22. **Suspect Ralph Chavez Sr.**: Lieutenant Curd of the Bell Gardens Police Department received a call from Allstate Life Insurance Company and was informed that Ralph Chavez Sr., father of deceased victim Ralph Chavez Jr., had taken out a $20,000 life insurance policy on his son. There was an additional clause of Accidental Death or Dismemberment for $20,000 on April 16, 1975. Allstate wanted to know if Mr. Chavez was the perpetrator of the crime. Exhibit S-A, BGPD Police Report by Lt. Curd, dated 8/5/76.

23. Later in the day, Mr. Chavez Sr. reported to the Bell Gardens station in

response to a message left by officers requesting to speak with him. The officers asked Mr. Chavez if he was having financial difficulties. Chavez admitted that he was in financial trouble.

24. Detectives told Mr. Chavez that they had been provided information that he had offered to pay his ex-wife's boyfriend, Paul Anderson, a.k.a. "Blackie," to kill his son. Mr. Chavez denied that he had. Detectives asked Mr. Chavez if he would agree to take a lie detector test, to which he agreed. The test was administered, and included questions such as "are you the one that slit your sons throat?", and "did you make arrangements with 'Blackie' to kill your son?" The polygraph results indicated that Mr. Chavez was being truthful. No further investigation into Mr. Chavez was recorded. Exhibit S-A, BGPD Supplemental Report by Det. Gardner, dated 8/5/76.

25. **Suspect Gary (Last Name Unknown)**: On October 22, 1976, just after midnight, Detective Apodaca received a call from a woman from Oildale, California. She was hiding from a man named "Gary" who had threatened her with a knife. The woman had met Gary at a bar. The two rented a hotel room together, smoked some marijuana and had sex. After they were finished, Gary asked to have anal intercourse. When the woman refused, Gary pulled a knife out of his pants and pointed it at her throat. Gary asked her if she heard about the decapitated woman found in the riverbed. When she said that she had, he said that he killed the woman because she didn't give him what he wanted.

26. Gary then asked her if she heard about the two kids that got their throats cut and said "well . . . I killed them two because they didn't give me what I wanted." He referred to one of the boys as a "cock sucker." The woman was able to escape and called Detective Apodaca. Exhibit S-A, BGPD Police Report by Det. Apodaca, dated 10/25/76. Gary was never found or interviewed by the Bell Gardens police.

27. **Suspect David Jenkins**: Venda Wells reported to Bell Gardens officers that her son's friend, David Jenkins, who had been staying with her and her son in July of 1976,

was a potential suspect.

28. On the night of the murder, Mrs. Wells saw David Jenkins crawling into the trailer late at night. Later the next day, Mrs. Wells found Jenkins's clothes in the hamper, covered with blood. She commented to Jenkins about the murders in Ford Park and said that she hoped the killer would be caught. He responded by saying, "no way" that it was "only a one time thing." He also admitted to being in the park shortly before the murders. Exhibit S-A, BGPD Continuation Report by Det. Gardner, dated 8/7/76.

29. When Jenkins reported to the police station and was interviewed, he said that he thought that he was at the park at about the time of the murders but that he was not wearing a watch so was not sure. He said that after he and his friend left the park, they drove around until late. When asked about the bloody clothes, he said that he did not know anything about that and did not remember having any blood on his clothes. Exhibit S-A, BGPD Police Report by Det. Gardner, dated 8/12/76.

30. BGPD officers administered a polygraph examination to Jenkins. Jenkins failed the question asking whether he was in the park at about the time of the murder. Jenkins was released without further investigation. Exhibit S-A, BGPD Continuation Report by Det. Bower, dated 8/16/76.

31. **Suspect Richard Hayden**: Richard Hayden was a close family friend of the Fowler family. The Fowler children all called him "Uncle Dick", although he was not a blood relative. Hayden regularly engaged in sexual acts with the Fowler children. Exhibit S-A, BGPD Police Report, dated 7/29/76.

32. He had molested them from the time they were very young. Scott's brother Marvin Fowler had told Nick Allikas, a family friend that Hayden "used to change our diapers when we were little and sucked our dicks then." Exhibit S-A, BGPD Police Report, Interview with Richard Hayden by Det. Gardner, dated 8/3/76. The Fowler children frequently spent time at Hayden's residence where they would engage in sex acts with

Hayden, other children, or both. Hayden denied teaching the boys about sex acts and suggested that some other adult male may have taught them some time earlier. Exhibit S-A, BGPD Police Report, Interview with Nick Allikas by Det. Gardner, dated 8/3/76.

33. **Suspect Nick Allikas**: Nick Allikas was an adult friend of the Fowler children who would occasionally engage in sexual acts with them.

34. At the time of the first interview, he was on probation for child molestation. Exhibit S-A, BGPD Police Report, Interview with Nick Allikas by Det. Gardner, dated 8/3/76. Allikas had previously been arrested out of state. His three children had all been placed in foster homes. Exhibit S-A, BGPD Police Report by Det. Gardner, dated 8/2/76.

35. At 9:25 P.M. on the night of the murder, only two and a half hours before the murders, employees at a Taco Bell told officers that Nick Allikas and Ralph Chavez came in together and ordered food. One employee, Mary Marie Merk, and another observer, said that Ralph was acting quiet and nervous. Allikas was so nervous that Merk was afraid she was going to be robbed. When he handed her money for the food, his hand was visibly shaking. Exhibit S-A, BGPD Continuation Report by Det. Edwards, dated 7/29/76.

36. Allikas's statement regarding his whereabouts on the night of the murders attempted to account for his time that evening. He claimed that he was with Marvin Fowler for most of the day and evening and then went bowling. Exhibit S-A, BGPD Police Report by Det. Gardner, dated 8/2/76.

37. In the interview with Marvin Fowler, Marvin was asked if he thought Nick was involved in the murder. Marvin said that he did not know, but if he was, Marvin would testify against him. Exhibit S-A, BGPD Police Report by Dep. Figueroa, dated 8/2/76.

38. **Suspect Jim Luna**: Jim Luna was the director of the youth organization, the Sugar Ray Foundation. Jim Luna had also been having sexual relations with the Fowler boys. He had a verbal altercation with Mary Fowler, Scott's mother, in the past.

39. Jim occasionally took the boys fishing. Scott Fowler's friend, Frank McCoy,

told officers that occasionally when Luna would drive up in his car, Scott would say he had to go and would leave with Mr. Luna.

40. McCoy said that he knew that Scott had spent the night with Mr. Luna on several occasions. Exhibit S-A, BGPD Police Report by Det. Gardner, dated 7/28/76.

41. **Suspect Charles Vanoy**: On August 25, 1977, Bell Gardens officers interviewed an informant named Carl Hamilton. Hamilton told the officers about his friend Charles Vanoy, known as "Chuck." Hamilton described several crimes to which Chuck confessed. Chuck, who lived near Ford Park, had set several fires on Clara street in Bell Gardens and committed armed robberies. He was involved in a shooting of two children and also the stabbing of an elderly man.

42. Vanoy had been in Ford Park and saw the suspect in the 1976 double homicide. He added that the suspect worked in a motorcycle shop on Eastern. Vanoy had even pointed out the shop to Hamilton while the two were driving around town. Vanoy's whereabouts were known to the police officers at the time, yet no interview or follow up investigation occurred. Exhibit S-A, BGPD Police Report, dated 8/25/77.

43. There was no strategic reason for counsel not to investigate and bring up these alternate suspects. Counsel's failure to do so violated petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

CLAIM 87: Trial Counsel Rendered Ineffective Assistance by Failing at the Guilt Phase as a Result of the Failure to Adequately Investigate the Identity of the Actual Killer or Killers in the 1976 Offenses.

1. Defense counsel failed to investigate and present evidence which could have been obtained as a result of leads contained in the discovery materials including, but not limited to, evidence that two other individuals were involved in the actual killings, neither of whom was petitioner. See Exhibits S-A and G and H.

2. Had trial counsel investigated and presented this evidence, it is reasonably probable that the outcome would have been different at the guilt and penalty phases had this

failure not occurred.

2. PRE-TRIAL.

CLAIM 88: Trial Counsel Rendered Ineffective Assistance by Failing to Attack the Credibility of the Police Officers.

1. On December 19, 1978, trial counsel, Peter Williams, filed a *Pitchess* motion for pretrial discovery. The motion requested the names and addresses of all persons who filed complaints with the South Gate Police Department, but was limited "to unnecessary acts of aggressive behavior, acts of violence, and/or attempted violence, and acts of excessive force and/or attempted excessive force." Notice of Motion for Pretrial Discovery 2, filed 12/19/78. This motion was denied.

2. Petitioner appealed his conviction. During the pendency of that appeal the South Gate Police Department purged the personnel files. Because of the destruction of the records, the prosecution never turned over the requested *Pitchess* materials. (RT 304). This Court reversed petitioner's earlier conviction because of the trial court's denial of the *Pitchess* motion. It must now be reversed because the government destroyed the very evidence at issue

3. To remedy the destruction, the trial court had each officer give a statement whether, to the best of their knowledge, complaints had been filed against them for excessive force. See Statements attached to April 30, 1986 Letter from Richard Huntrods, Custodian of Records at the South Gate Police Department. They also testified in court to this effect. (RT 306-354).

4. Trial counsel never filed a *Pitchess* motion regarding the officers' lack of credibility or untruthfulness. The officers were never asked, and thus did not disclose, whether they had any complaints pertaining to those attributes in their files. The officers' reputation for truthfulness was critical in petitioner's trial for several reasons.

5. The credibility of the officers was in question regarding excessive force.

Officer Greene testified that he never had any complaints of excessive force filed against him. (RT 347). Petitioner's counsel, Michael Carney, had prosecuted a case when he worked for the District Attorney's Office in which a complaint of excessive force was filed against Officer Greene. (RT 363). Carney testified that while laying the foundation for the complaint, he showed Officer Greene the complaint and "confronted him with the fact that there was a written complaint filed against him, and [Greene] indicated that he was aware of that complaint." (RT 364). After Carney related the incident to the court, Officer Greene admitted to the incident of excessive force, but nevertheless denied awareness of the complaint. (RT 590). None of this testimony was presented to the jury.

6. Petitioner contended that the officers' coerced his statement, which was involuntary. The confession was not tape recorded or video taped. Petitioner never signed an advisement of rights form. The notes that were taken were not written contemporaneously but were prepared after the alleged confession was given in its entirety. (RT 2465). The only evidence of the voluntariness of the alleged confession was the word of the officers who were present. Their credibility was a primary factor in determining whether the prosecution carried its burden of showing that the statement was voluntary.

7. The officers' credibility was at issue regarding other aspects of petitioner's arrest. For example, probable cause for the arrest was based on several factors which were dependent on the credibility of the officers.

8. The police used a sketch drawn of the suspect as "envisioned" by a psychic whose help the police enlisted, as an investigatory technique. The officers claimed that probable cause was not based on this sketch. The believability of this claim depended on the credibility of the officers.

9. Similarly, Officers Sims and Gluhak who made the arrest claimed that petitioner let them enter his apartment willingly and voluntarily. (RT 682). In contrast, petitioner contends that when the officers asked to enter the apartment, petitioner asked if

he could decline and they said it would do him no good. (RT 2143). Probable cause was a critical element of the arrest; without it, all evidence gathered as a result of the arrest would be rendered inadmissable.

10. Prejudicial evidence was also at issue. According to officers, photographs of nude boys were strewn all about petitioner's apartment. Petitioner denied this assertionand testified that any such photographs were concealed in various locations around his apartment. (RT 2144-2145). The investigating officers said that the photographs were in plain view and were lawfully seized. As the pictures were actually hidden away in a closed container, their warrantless seizure was unlawful.

11. These photographs were prejudicial by themselves. The photos also served as the prosecution's evidence of petitioner's alleged motive. Had these photographs been suppressed, the prosecution would have been deprived of this highly prejudicial evidence.

12. The prosecution case depended almost completely on the credibility of the officers. Without information regarding their credibility, counsel was unable to effectively impeach their testimony. Thus, trial counsels' failure to file a *Pitchess* motion and attack their credibility was ineffective and prejudicial to petitioner.

13. Similarly, trial counsel never questioned Officer Greene before the jury about his false testimony regarding the complaints filed against him. Because of the purge, trial counsel had only the officers' word that there were no complaints filed against them for excessive force or brutality. Officer Greene failed to testify about these two incidents about which trial counsel Carney testified. Either way, his credibility would have been damaged which was critical to petitioner's defense.

14. Trial counsel should have used the false statement to impeach Officer Greene. Since the *Pitchess* material was not available and Greene made a false statement regarding his personnel file, the jury should have been permitted to draw their own conclusion about the existence of complaints against the officer for excessive force and

for his credibility and honesty.

15. It was incumbent on trial counsel to raise the incidents of excessive force to the jury through transcripts or Greene's testimony, while disputing the voluntariness of the confession.

16. Trial counsel introduced the testimony of two witnesses, Angelina Nasca and Louis Moreno, at the 402 hearing to demonstrate that South Gate Police Officers in general, and Officer Greene specifically, routinely engaged in abusive and coercive tactics while arresting and interrogating suspects. There was no tactical reason not to introduce Officer Greene's previous testimony where further examples of his use of excessive force were described. The *Pitchess* motion was filed to unearth just this type of misconduct. Trial counsel should have used the misconduct to petitioner's advantage, once the information came to light.

17. The method the trial judge employed to remedy the destruction of the *Pitchess* information was inadequate. Officer Greene testified that there were no complaints in his personnel file on the two occasions he saw the contents of the file. Yet Michael Carney knew that there was a complaint against Officer Greene when he had worked as a prosecutor for the District Attorney's Office. Greene subsequently admitted to this incident and one other.

18. Trial counsel should have used this concession to alert the court that the method for discerning whether complaints existed against the officers was inadequate. Had the remarkable circumstances of Carney leaving the District Attorney's Office, serving as petitioner's attorney and recalling the case in which Greene was confronted with a complaint, Greene's false testimony would not have come to light.

19. There is no way to know of the false testimony other officers may have provided which went undiscovered. What is apparent, however, is that the trial court's efforts to remedy the purged *Pitchess* records was insufficient.

20. There were four police officers who testified about critical events in this case and whose *Pitchess* information was requested but not divulged (Officers Simms, Gluhak, Greene and Carter). Trial counsel was unable to cross-examine the witnesses about their credibility because of the purge of *Pitchess* files. Under these circumstances, counsel lacked critical information and was unable to render effective assistance of counsel which prejudiced petitioner.

CLAIM 89: Trial Counsel was Ineffective for Failing to Raise Issues Concerning the Missing-Juvenile Report.

1. The legality of petitioner's arrest was raised at pretrial proceedings at the first trial. The 1538.5 motion was litigated at that time, denied and raised on appeal in *Memro I* and the related habeas petition. This Court did not reach the suppression issue in either the appeal or the habeas proceedings.

2. Counsel at the second trial was prevented from re-litigating the suppression issue, despite allegations of ineffective assistance of counsel at the 1538.5 motion, a declaration of prior counsel Williams admitting such, and the existence of new relevant facts.

3. The South Gate Police Department missing-juvenile report on Carl Carter, Jr., was prepared on October 22, 1978. The report indicates that Carl, Jr., was last seen by his brother near the rear of his residence at 7:00 p.m. (1900 hours) on that date. Missing-juvenile report, Exhibit S-H.

4. Officer Sims arrested petitioner on October 27, 1978. In determining probable cause for the arrest, Officer Sims purportedly relied heavily on his alleged belief that petitioner was the last person to have seen the boy prior to his disappearance. This alleged belief was based on two purported facts: first, that Carl, Jr., was claimed to be noticed as missing at 6:00 p.m. and, second, that petitioner admitted his presence at the Carter residence at that time. However, Sims later admitted having been aware of the

contents of the missing person report at the time. Moreover, the court, in finding probable cause for the arrest, considered it significant that according to police testimony, petitioner was the last person with Carl, Jr., prior to his disappearance.

5. The missing-juvenile report directly contradicts a significant factor upon which the arresting officer and the court based the probable cause determination. Furthermore, the report corroborates the statement police attributed to petitioner that Carl, Jr., was safely walking toward his home from a nearby donut shop shortly after 6:00 p.m. A reasonably diligent advocate would have used the report to challenge the truthfulness of the arresting officer and the legality of the arrest. This document is critical because it refutes the statement by Officer Sims that he believed petitioner was the last person to see the boy prior to his disappearance. This purported "belief" by the officer was a critical, if not the only basis, for his immediate arrest of petitioner.

6. Mr. Williams did not use the missing-juvenile report to cross-examine Officer Sims or otherwise make reference to the Report. There was no possible tactical reason for not making reference to that report. Mr. Williams candidly states that if he were engaged in the same suppression hearing today, there is no doubt he would "attempt to use the report to impeach the testimony of arresting officers Sims and Gluhak and also argue to the court that the report served to substantiate the lack of probable cause for defendant's arrest." Declaration of Peter M. Williams and Exhibit S-I.

7. Defense counsel's failure to use the missing-juvenile report deprived petitioner of a legitimate opportunity to prevail. Proper use of the report would have caused the court to find the arrest illegal. Because the confession is a fruit of the arrest, proper use of the report would have caused the "confession" to be suppressed. If Mr. Williams had used the missing-juvenile report, there would have been a result more favorable to petitioner at the guilt and penalty phases.

8. Trial counsel at the second trial, Peter Larkin, filed a written motion for

relitigation of the suppression motion in the second trial proceedings; however, the motion failed to allege that the prior counsel had provided ineffective assistance of counsel by failing to use the missing-juvenile report to refute the testimony of the officers regarding the time Carter was last seen alive by his family. Mr. Larkin was aware or reasonably should have been aware of this basis for the relitigation of the motion because this issue had been raised in petitioner's habeas petition filed in conjunction with the first appeal. The record contained in the first appeal and habeas petition was reasonably available to petitioner's counsel.

9. At the oral argument on the motion to relitigate the suppression issue, Mr. Larkin argued primarily that the relitigation was proper in light of the new discovery materials and the destruction of the citizen complaints. Mr. Larkin did mention the missing-juvenile report and the error of prior trial counsel, but he failed to present to the court the affidavit of Peter Williams or his testimony, which were available to him.

10. Complete reference to the issue of the ineffective assistance of first trial counsel and presentation of the affidavit would have led to a more favorable result in the suppression hearing and at the guilt phase. The evidence not introduced because of trial counsel's ineffectiveness was critical impeachment testimony regarding the lack of probable cause for the arrest of petitioner. Suppression of the confession as the fruit of the unlawful arrest would have led to the dismissal of the case against petitioner. There was no possible tactical reason for trial counsel not to pursue the relitigation of the suppression motion on these grounds.

CLAIM 90: Petitioner's Sixth, Eighth and Fourteenth Amendment Rights were Violated as a Result of Counsel's Failure to Investigate and Present Scientific Evidence or to Cross-Examine the Coroner Regarding the Alleged Penal Code § 288 Violation.

1. A central issue in the first trial was the timing or existence of the alleged Penal Code § 288 or attempted Penal Code § 288 on Carl Carter, Jr. Counsel at the first

trial extensively cross-examined the medical officer about the timing of any Penal Code § 288. This issue is critical to the felony-murder theory of conviction, as the victim must be alive at the time of an actual or attempted Penal Code § 288 for a violation of this offense, under California law.

2. At the second trial, defense counsel did not investigate or adequately challenge evidence of the timing or existence of a sodomy or attempted sodomy. Trial counsel did not contact or receive a report from a criminalist or serologist on this issue. There should also have been a report of biological analysis, which counsel never received or attempted to obtain.

3. A more favorable result in the guilt and penalty phase of the trial would have resulted from the investigation of this factor. After the extensive cross-examination into this area at the first trial, the trial judge, sitting as the trier of fact, found that the felony-murder special circumstance allegation was not true. If this evidence had been more thoroughly challenged at the second trial, there would have been no basis for the finding of a felony murder. Since the evidence of a premeditated murder was weak and not sufficient to support a first-degree murder charge, the result of this investigation and cross-examination would have been a finding of no more than second-degree murder, thereby preventing any possibility of a death sentence.

4. If trial counsel had engaged in an adequate investigation of this issue, the following facts would have been disclosed:

a. Based upon the state of decomposition of the body at the time of the autopsy, it would have been completely impossible to determine whether any Penal Code § 288 or injury to or penetration of the anus, occurred at all, and if it did, whether it occurred before or after death. In fact, it would have been impossible to determine the relative times within a 48 hour period.

b. The acid phosphatase test described in Dr. Choi's testimony is sensitive to

the presence of a component of seminal fluid also to be found in other body fluids and in bacteria and a variety of food substances. As a result, a positive finding on the acid phosphatase test, even a "4," does not necessarily imply the presence of seminal fluid.

c. A positive finding on the acid phosphatase test in this case was likely a result of laboratory error, since the test was performed at least six or seven days after death, but ordinarily is not reliable after 24 hours.

d. The acid phosphatase test is a "Yes or No" test; that is, it determines only that acid phosphatase is or is not present, but does not determine amounts. The 0-4 scale referred to by Dr. Choi is very subjective and the meaning of a given value of the number depends upon the subjective view of the individual who ran the test. Because of these limitations, the test is used rarely, if at all. In fact, it had come into disfavor as of 1987, when petitioner was tried the second time. A positive acid phosphatase test where neither sperm nor seminal fluid is found is not alone indicative of semen.

e. As a result of decomposition, semen ordinarily no longer gives a positive acid phosphatase test after 24 hours. As a result, a positive acid phosphatase test on a swab sample taken from a decomposing body six or more days after death must have come from some other source.

f. In the opinion of forensic pathologist Dr. Thomas W. Rogers, the above facts were sufficiently well known in 1987 that an attorney who had consulted with a reasonably informed pathologist, as a conscientious and diligent advocate would have done, would have possessed the information and could have presented it through either cross-examination or separate expert testimony. Exhibit K.

5. "[C]ounsel's function, as elaborated in prevailing professional norms, is to

make the adversarial testing process work in the particular case." *Strickland v. Washington,* 466 U.S. 668, 690 (1984)."[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" (*Id.*, at p. 691). Where a decision is based on counsel's neglect or failure to discover relevant evidence, rather than an informed strategic decision based on a reasonable investigation, counsel has failed to meet the constitutional standard for effective assistance. *Williams v. Turpin*, 87 F.3d 1204, 1211 (11th Cir. 1996).

6. Ineffective assistance is demonstrated where a petitioner shows that trial counsel's decisions resulted from a lack of diligence in preparation and investigation. *Sanders v. Rawtelle,* 21 F.3d 1446, 1456 (9th Cir. 1994) ("counsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client").

7. Trial counsel committed numerous acts and omissions resulting in a fundamentally unfair trial in violation of petitioner's Sixth Amendment guarantee to effective assistance of counsel. Petitioner suffered prejudice as a result of trial counsel's inadequate assistance because " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694.

8. As a result of the above, there is a reasonable probability that the outcome in this case would have been different with adequate investigation. The absence of adequate investigation and cross-examination regarding the timing and existence of the alleged Penal Code § 288, and specifically the interpretation of the acid phosphatase test and the examination of a decomposed body, deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

CLAIM 91: Trial Counsel Rendered Ineffective Assistance When He Failed to Impeach Cornejo Based on Favors Regularly Conferred upon Him in Exchange for His Testimony.

1. Competent counsel would have investigated the cases in which Cornejo claimed he had testified. Had counsel done so, he could have impeached Cornejo with his lies. Moreover, the prosecutor actively suborned perjury through Cornejo's testimony. This failure to investigate and impeach Cornejo violated *Strickland*. To the extent that the District Attorney knew or should have known this testimony was false or misleading, the District Attorney was required under *Brady* to inform counsel.

2. To the extent the prosecutor disclosed Cornejo's checkered past to trial counsel, then trial counsel rendered ineffective assistance of counsel in failing to impeach Cornejo. If the documents were not disclosed, the prosecutor committed prosecutorial misconduct in failing to disclose evidence which demonstrated a complete lack of credibility on the part of the jailhouse informant who was used as a witness for the prosecution at a critical stage of petitioner's trial.

3. It is clear that Cornejo came to expect benefits for his testimony. Occasionally, the quid pro quo was actually documented. In 1984, a case against Cornejo was reduced to a misdemeanor. A supplemental report in the prosecutor's case file noted that the "judge made misdemeanor by sentence since plaintiff wouldn't agree to misdemeanor. Defendant is a snitch and testified in *Bittaker* case." "Significant developments" dated 5/25/84, initialed by SMC.

4. The disposition report also reflects this deal and adds that Cornejo initiated the agreement. It says that "Since he's on federal parole he wants [a misdemeanor]." (Disposition report, dated 5/25/84, signed by Deputy District Attorney Canter). In 1975, Cornejo was charged with four counts: burglary, receiving stolen property and grand theft. A District Attorney's Recommendation dated 9/25/75, by Deputy District Attorney Howard, recommends the more serious counts be dismissed and Cornejo be allowed to

plead to receiving stolen property. Under 'reasons' is written, defendant has "turned a major narcotics deal in the near past."

5. In the preliminary hearing in *Bittaker*, Cornejo was asked in cross-examination if he was ever promised any benefits for informing:

Q: Did you expect to get something in return for giving this information?

A: Well, it was usually money.

Q: They usually paid you money?

A: It depends.

Q: How long a period of time have you been receiving money from the police for giving them information?

A: I just told you.

Q: Two years?

A: Two years.

People v. Bittaker Preliminary Hearing transcript [7/14/80] at 1446.

6. Even when the deal was not written out explicitly, offers and expectations can still be found. In a letter to Van De Kamp from Cornejo dated 5/15/82, Cornejo voiced his frustration with the lack of favors conferred in exchange for the help he had offered: "all four of your DAs promised I would get a time cut or an early parole . . . I am sick of DA's lying to me also having me say things that they know are not right."

7. Cornejo wrote Deputy District Attorney Millett about a conversation they had, which gave Cornejo the impression that he was being made an offer in exchange for testimony against Mr. Reno. The letter reads, "Sir I want you to know if my sentence is reduced I will not let you and Mr. Sinesay down," and indicated that they had spoken the previous day. Cornejo then asked Deputy District Attorney Millett to grant him "a chance to start a new life." The last paragraph reads, "I hope to hear from you soon. Ever since your call my mind has been filled with hope. God bless you Mr. Millett." Exhibit D, Letter

from Cornejo to Millett, dated 7/19/90.

8. A Memorandum from Deputy District Attorney Ramsay Rudolph to Stephen Kay, dated 9/15/80, warned that Cornejo "has in the past, on several occasions said he would not testify unless we get him out of jail by a certain date." Exhibit F. A Memorandum written by Stephen Kay noted that Cornejo was "fond of making threats as to how he is going to get even with us for the DAs office not getting him out of federal prison. Prison is undoubtedly the best place for Mr. Cornejo, and as far as he is concerned, I only wish they could throw away the key." Exhibit F, Memorandum from Stephen Kay to Billy D. Webb, dated 6/1/82.

9. Mr. Reno alleged that Cornejo stole his transcript from the first trial. Cornejo used that information to testify at the hearing to determine the voluntariness and admissibility of petitioner's purported confession. Mr. Reno told Deputy District Attorney Millett this fact in lock-up when Millett came to interview a witness on a different matter. Millett used Cornejo at the hearing anyway. Exhibit F, Memorandum from Millett to Larry Trapp, 10/31/88.

10. This claim was corroborated in letters by other jailhouse informants. A letter written from Sydney Storch and Leslie White, dated 11/27/86 made this claim, as well as a letter signed by Leslie White and Howard Stewart, also dated 11/27/86 in which they claimed that Cornejo got his information on the case from a transcript he stole from Mr. Reno's cell. Leslie White testified in court that Cornejo committed perjury in his testimony against petitioner.

11. On March 10, 1989, the District Attorney's Office sent a letter to trial counsel Larkin, and to Thomas Nolan, the attorney representing Mr. Reno in his direct appeal, with an accompanying excerpt of Leslie White's testimony in an unnamed case in San Bernadino. White was being questioned about tactics he used to fabricate confessions and the methods that he had divulged to the Los Angeles Sheriffs department when the

jailhouse snitch scandal broke. During cross-examination, counsel asked White to name the defendant who was put on death row by perjured testimony, who he had referred to on direct. White named Mr. Reno as the defendant and "Randy Hill Conejo [Sic]" as the informant who fabricated the testimony.

12. When asked for details, White explained that Mr. Reno had claimed that the confession was involuntary and that it had been beaten out of him. White also told the District Attorney's Office that "Mr. Memro's death sentence was due 'in considerable part' to the testimony of Anthony Cornejo." Letter from Deputy District Attorney Sundstedt to Thomas Nolan, dated 3/10/89, page 9727 of the attached transcript.

13. In 1988, an *LA Times* article recounted a telephone conversation the journalist held with Leslie White. During the interview, White listed three men he said were on death row because of false testimony given by other jailhouse informants. One of the men he listed was Mr. Reno. (*LA Times*, "Jail inmate says he lied in role as informant", 12/1/88, by Ted Rohrlich.) In 1999, he made the same claim yet again in the LA Times in an article that he wrote. In his article, White wrote that

> I read a statement by Richard Hecht, director of the district attorney's branch operations, who said 107 cases, involving 121 informants, have been assessed and he has found none that resulted in a wrongful conviction (Nov. 18, Metro) With that in mind, I said to myself, he must not have yet reviewed the cases of People vs. Stephen Vulpis, Harold Memro . . . because, if he has, he better take another look. There are big problems with those cases. Perjury has been or will be committed in every one of them and many others.

LA Times, "Jailhouse Informants", 12/1/88, Metro.

14. On December 10, 1986, inmate Howard Stewart wrote a letter to the Los Angeles Superior Court and to the District Attorney's Office. Stewart explained that he was housed in the neighboring cell to Mr. Reno and that all of the information that the jailhouse informants had about Mr. Reno's case was gleaned from a transcript taken from Mr. Reno's cell by Leslie White and another unnamed inmate. Stewart explained that the

inmates discussed petitioner's case while he was in court and that at least one of the inmates who had information on petitioner had never spoken with him. Stewart added that two inmates asked him to help them "book" petitioner and back up their stories and suggested that he would get released if he complied.

15. Trial counsel's failure to use the documentary evidence available to him prejudiced defendant and affected the outcome of the 402 hearing and trial strategy, resulting in the admission of an involuntary and inaccurate confession. The prosecutor's failure to disclose all evidence constituted prosecutorial misconduct, which prejudiced defendant in the same manner. The resulting conviction and sentence were obtained in violation of plaintiff's Fifth, Sixth, Eighth and Fourteenth Amendment rights and are not worthy of confidence.

CLAIM 92: Trial Counsel Rendered Ineffective Assistance by Failing to Bring the Order from the First Trial to the Court's Attention.

1. To the extent that trial counsel failed to bring the order requiring special transportation from the 1979 trial to the trial court's attention during the second trial, trial counsel rendered ineffective assistance of counsel. The order was never rescinded. Trial counsel requested a similar order from the court, but failed to note that an order was already in place.

2. The trial court doubted its own authority. Considering the issuance of the prior court order in this regard, it was incumbent on trial counsel to bring that prior order to the court's attention. There was no tactical reason not to do so.

3. This failure was ineffective on the part of trial counsel, and prejudiced the defendant in that it allowed four snitches to manufacture information which they claimed was based on conversations held on the bus. Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated.

CLAIM 93: Trial Counsel's Ineffectiveness Denied Petitioner His Right to a Speedy Trial.

1. After reversal of his first conviction, petitioner was returned to Superior Court for retrial on August 12, 1985. At that time, he was advised of his right to a speedy trial; he waived that right and attorneys were appointed for him at that court session. (RT 2). For the next eight months, petitioner continued to waive time in order to allow his attorneys to prepare for the retrial.

2. During the first three months of representation of petitioner, trial attorney Larkin spent a total of 42 hours in preparation for the case. (CT 126-128). No motions were filed until March 1986. Understandably upset with the lack of preparation, petitioner sought to have trial counsel removed from the case on April 18, 1986. When his motion was denied, petitioner withdrew his time waiver and the 60-day statutory period began to run.

3. Throughout the next two months, petitioner continually objected to the lack of work by trial counsel. During hearings in court, trial counsel stated that he would seek further continuances to do more investigation and preparation over his client's objection. On June 9, 1986, over petitioner's objection, trial counsel moved for lengthy continuances to prepare motions. Dates were set in July, September and October, with a trial date in November 1986. (CT 190). Between June and December 1986, attorney Larkin met with petitioner only five times and spent a total of 98 hours in preparation of the case. (CT 288-289).

4. On June 18, 1986, petitioner, in a handwritten motion to the court, moved for dismissal of the charges because his case was not brought to trial within the specified statutory period. That motion was effectively denied when the court continued to grant continuances to counsel, always over the renewed objections of petitioner. (CT 195-196).

5. By the time the case was called for trial in November 1986, the prosecutor

had brought forth new evidence, claiming that several jailhouse informants had spoken with petitioner regarding his testimony about the voluntariness of his confession. One of these new witnesses (Cornejo) did eventually testify at the hearing on the admissibility of the confession. Additionally, the prosecutor "found" old evidence from the 1976 homicide case that had never been turned over to the defense at either trial.

6. In November, trial counsel again requested more time to prepare and sought yet another continuance over petitioner's objection. Trial was continued to February 18, 1987. After further continuances at the request of trial counsel over petitioner's objection, the case finally proceeded to trial on April 1, 1987, almost one year after petitioner had withdrawn his time waiver and demanded a speedy trial.

7. Under California law, trial counsel does not have absolute authority to waive his client's right to a speedy trial. Penal Code § 1382 provides:

> The power of appointed counsel to control judicial strategy and to waive non-fundamental rights despite his client's objection [citation] presumes effective counsel acting for the best interest of the client. . . . `[E]ffectiveness . . . is not a matter of professional competence alone. It also includes the requirement that the services of the attorney be devoted solely to the interest of his client undiminished by conflicting considerations.'

People v. Johnson, 26 Cal.3d 557, 566 (1980). A defendant's right to a speedy trial cannot be abrogated by a defense attorney who is ineffective, inadequate, or lazy and indifferent. *Id.* at 567. Nor can defense counsel use the excuse of a heavy caseload to justify the requested continuance when his client objects.

8. Petitioner initially cooperated with counsel's requests for continuances. Mr. Larkin had not represented petitioner at the first trial and needed time to become familiar with the record and reports generated in the first proceeding. Accordingly, petitioner waived speedy-trial time constraints for eight months to allow counsel sufficient time to prepare for the case.

9. In those eight months, however, counsel spent only 108.5 hours (i.e., less

than 4 hours per week) on the matter and had barely filed some of the standard pretrial motions when petitioner finally withdrew his time waiver.

10. On November 14, 1985, an additional attorney was appointed as back-up for Mr. Larkin. (CT 431). That attorney spent one half-hour on petitioner's case during the first two months of his appointment, approximately 20 hours the next month and eventually met with petitioner for the first time on February 7, 1986, three months after being appointed. (CT 434).

11. Based on this record, the only reasonable conclusion is that petitioner's attorneys were indifferent to his case and were clearly devoting inadequate time to their representation of him prior to the time he withdrew his time waiver. Between the two attorneys, they appear to have spent, on average, less than two hours per week on petitioner's case from the time of their appointment until he sought to exercise his right to a speedy trial.

12. Petitioner was prejudiced by the denial of a speedy trial because if he had been brought to trial within the statutory period, the testimony of the jailhouse informants would not have become available and been used against him during the motion to suppress his confession. This false and perjurious testimony was extremely damaging, as it undercut petitioner's version of the events surrounding the confession and supported the version of the police and effectively mandated petitioner's strategy at trial in regard to not challenging his coerced confession in front of the jury. As the prosecutor conceded throughout the proceedings, there was no case against petitioner without the admission of his confession. In addition, after the running of the 60-day period, the prosecutor (a) "found" additional discovery relating to the 1976 murders, which required further delays in the proceedings, and (b) "lost" evidence favorable to the defense.

13. The failure to apply the state statutory speedy trial rules to petitioner, which requires mandatory dismissal and denial of petitioner's right to have the charges against him

dismissed for not having been brought to trial within the statutory 60-day time limit operated to deny him a full and fair 1538.5 hearing and violated his right to due process under the Fourteenth Amendment. *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Additionally, counsel's ineffectiveness in protecting his state speedy trial rights prejudiced petitioner's case. Accordingly, his right to effective assistance of counsel was denied.

CLAIM 94: Trial Counsel Rendered Ineffective Assistance by Failing to Use the Police Missing-Juvenile Report to Impeach Key Prosecution Testimony and Otherwise Undermine the Legality of Petitioner's Arrest.

1. The legality of petitioner's arrest was raised at pretrial proceedings related to the first trial. The 1538.5 motion was litigated at that time, denied and raised on appeal in *Memro I* and the related habeas petition. This Court did not reach the suppression issue in either the appeal or companion habeas proceedings (which was completely ignored). Counsel at the second trial was prevented from re-litigating the suppression issue, despite ineffective assistance of counsel at the 1538.5 motion and the existence of new relevant facts obtained from previously improperly withheld discovery and *Brady* materials.

2. The South Gate Police Department's missing-juvenile report on Carl Carter, Jr., was prepared on October 22, 1978. The report indicates that Carter was last seen by his brother near the rear of his residence at 7:00 p.m. (1900 hours) on that date—the date of Carter's disappearance. (Missing-juvenile report, Exhibit S-H).

3. Officer Sims arrested petitioner on October 27, 1978. In determining probable cause for the arrest, Officer Sims relied heavily on his purported belief that petitioner was the last person to have seen the boy prior to his disappearance. This alleged belief was based on two purported facts: first, that Carter was claimed to be observed missing at 6:00 p.m. and, second, that petitioner admitted his presence at the Carter residence at that time. Moreover, the court, in finding probable cause for the arrest, considered it significant that according to police testimony, petitioner was the last person known to have seen Carter prior to his disappearance.

4. The missing-juvenile report directly contradicts the crucial factor upon which the arresting officer and the court based the probable cause determination. Furthermore, the report actually corroborates the statement police attribute to petitioner that he didn't do anything to Carter and that the boy was safely walking toward his home from a nearby donut shop shortly after 6:00 p.m. when petitioner last saw him.

5. A reasonably diligent advocate would have used the missing-juvenile report to challenge the truthfulness of the arresting officer and the legality of the arrest. This document is critical because it refutes the statement by Officer Sims that he allegedly believed petitioner was the last person to see the boy prior to his disappearance, and yet Sims testified to being aware of the contents of the missing-juvenile report. This purported "belief" by the officer was a critical, if not the only basis, for his immediate warrantless arrest of petitioner and the crucial factor in the finding of probable cause by the court.

6. Trial counsel Williams did not use the missing-juvenile report to cross-examine Officer Sims or otherwise make reference to the report. There was no possible tactical reason for not making reference to that report. Mr. Williams candidly states that if he were engaged in the same suppression hearing today, there is no doubt he would "attempt to use the report to impeach the testimony of arresting officers Sims and Gluhak and also argue to the court that the report served to substantiate the lack of probable cause for defendant's arrest." Declaration of Peter M. Williams and Exhibit S-I.

7. Defense counsel's failure to use the missing-juvenile report deprived petitioner of a legitimate opportunity to prevail. Proper use of the report would have caused the court to find the arrest illegal. Because the confession is a fruit of the arrest, proper use of the report would have caused the confession to be suppressed. If Mr. Williams had used the missing-juvenile report, there would have been a result more favorable to petitioner at the guilt and penalty phases.

8. As a result of the above, petitioner was denied effective assistance of counsel

at the first trial and was denied effective assistance of counsel at the second trial in that Mr. Larkin failed to challenge the effectiveness of Mr. Williams.

3. JURY ISSUES.

CLAIM 95: Trial Counsel Rendered Ineffective Assistance During Voir Dire.

1. Trial counsel rendered ineffective assistance of counsel by allowing deficient questionnaires to be distributed to prospective jurors. Counsel failed to cure the deficiencies in the questionnaires with adequate questioning during voir dire.

2. The jury questionnaires failed to list the potential witnesses, which was necessary to determine if the potential jurors knew any witnesses. One juror did know one of the witnesses personally, although this did not come out until much later in trial. Juror Zinn knew and worked with Officer Barclift, a critical prosecution witness. Had trial counsel ensured an adequate questionnaire, he would have known of this relationship before allowing Juror Zinn to serve on the jury.

3. The questionnaire gave an inadequate description of the crime charged. The questionnaire stated: "The defendant is charged with the killing of three boys, ages, 12, 10, and 7. The prosecution is alleging that one of the killings occurred during the course of a special circumstance." This was followed with these questions: "1. Have you ever heard of this case. 2. Does the nature of the crime charged prevent you from being fair and impartial to either side based on the nature of the charges alone." (CT 384).

4. With only petitioner's name and the fact that he was accused of killing three boys, there were not enough facts given for a juror to be able to effectively gauge whether or not they had heard about the cases, which occurred nine and eleven years prior to jury selection. Facts such as two of the killings occurred in a park several years before, or the fact that the killing in Count 3 began as a well publicized case of a missing seven year old child might have helped jar the memories of the potential jurors. The information was misleading because it implied that the three victims were killed at the same time. The

summary provided insufficient detail for the jurors to determine whether they had previously heard of petitioner's case.

5. The limited information provided was not sufficient to determine whether the prospective jurors could be fair and impartial to both sides based on the charges alone. The charges were never explained. Terms like "special circumstance" were never defined, so the jurors could not provide any information about their feelings. The inflammatory facts of alleged child molestation were kept from the jurors. Without this information, counsel could not question effectively during voir dire. Competent capital counsel would have ensured that the questionnaires provided adequate information.

6. Throughout voir dire, trial counsel failed to ask questions about a series of answers on the jury questionnaires that should have raised suspicion about the impartiality of the potential jurors. He also failed to follow up on questioning which arose during voir dire. Since questionnaires were not preserved from prospective jurors who were not chosen as jurors, it is problematic to investigate whether those voir dire examinations were performed competently or not. All of the following jurors were on the final jury.

7. Sandra Torfason had a relative who was a police officer in San Dimas. Trial counsel asked no questions concerning her relative or whether having a relative who was a police officer might sway her objectivity. (RT 1985; Juror questionnaire Pg. 4). Effective counsel would have fully questioned Ms. Torfason in this area.

8. Elizabeth Burns had heard of the case before. She was taking paralegal classes and thought that her instructor may have discussed the case with the class. The few questions he asked about Ms. Burns familiarity with the case were cursory at best. Trial counsel asked "Have you thought any more of where you may have heard Mr. Memro's name?" (RT 923). She said she may have heard the name at school. (RT 923). He then asked if "something came up and triggered your memory," would she be able to objectively judge the case only on the evidence presented in court and she stated that she would. This

question was speculative at best. At no time did counsel or the court follow up on this issue as the case progressed.

9. Trial counsel inexplicably sought to rehabilitate her by asking, "you certainly wouldn't judge this on what you'd read in the newspapers?" (RT 927). Ms. Burns said she would not and that she could put that information out of her mind. Realistically, she could give no other answer. She explained that her paralegal class assigns her "case briefs on newspapers." (RT 927). Trial counsel did not ask which newspapers she was assigned, which cases she wrote on or any other questions concerning these class assignments.

10. Petitioner's case was widely publicized. Both the 1976 Bell Gardens killings and the Carl Carter killing in 1978 were heavily covered in the area newspapers. Ms. Burns lived in Bellflower, a nearby community to Bell Gardens and South Gate. She likely encountered stories about the cases. Due to the insufficiency of the questionnaires she may not have recognized the case. Counsel should have provided more specifics in both the questionnaires and his questions in order to make an informed determination.

11. Ms.Burns was also trained as a paralegal and had studied the criminal trial process. (RT 923). At least two areas of the trial required a certain amount of ignorance of the trial process by the jurors.

12. The jurors were told that the trial was being tried many years after the commission of the crime and were asked not to speculate about the reasons why. The prosecutor repeatedly informed prospective jurors of this fact during voir dire. (See, e.g. RT 569, 609, 636, 652, 673, 734, 762, 797, 829, 890, 901, 910, 946, 958, 963, 987, 1027, 1055, 1079, 1092, 1152, 1171, 1194, 1211, 1231, 1255, 1356, 1370, 1380, 1404, 1432, 1445, 1454, 1465, 1491, 1514, 1536, 1546, 1577). A person trained in law would know that a prior trial meant that there had been a prior conviction, the knowledge of which would severely prejudice petitioner.

13. The jury was also told that the murder in Count 1 was second degree as a

matter of law. They were told not to speculate as to why. A person trained in law could deduce why Count One 1, at most, was second degree as a matter of law. These two instructions taken together, that the trial was being held years after the crimes were committed and that the maximum charge on Count 1 was second degree as a matter of law, would lead someone trained in the law to conclude that the trial was a retrial, and hence, that there was a prior conviction.

14. Trial counsel should have challenged for cause on Ms. Burns due to her knowledge of the criminal trial process. At a bare minimum, trial counsel should have asked sufficient questions to clarify her base of legal knowledge. Such questioning would have allowed the intelligent exercise of a challenge for cause and/or peremptory challenges.

15. Trial counsel had six peremptories at the conclusion of the voir dire. Effective capital case counsel would have first engaged in adequate questioning to determine if a challenge for cause was proper. Failing that, competent counsel would have exercised a peremptory challenge to strike Ms. Burns and the other jurors discussed herein.

16. Two jurors, Angela Shiromani and Mary Jane Miler said that they were following the McMartin child molestation case which allegedly occurred at a Manhattan Beach preschool. The prosecution's case against petitioner rested on a theory of child molestation as the motive in all three counts. It was incumbent on trial counsel to explore the prospective jurors' attitudes about child molestation to determine if they were likely to be prejudiced against petitioner based solely on the prosecutor's theory of the case. Trial counsel asked no questions about their interest in the McMartin case or their reaction to the child molestation issue. The jury questionnaire was inadequate. Trial counsel had no basis to exercise either peremptory challenges or challenges for cause.

17. Marjorie Horton wrote on the questionnaire that she had a cousin who was a police officer. Trial counsel asked no questions concerning this response. She also said

that she had grandchildren ages 9 and 7. Trial counsel asked if that would bias her. She responded that "it might." When trial counsel asked if she was a strong supporter of the death penalty, she said yes. (RT 1356). Trial counsel passed for cause. Effective counsel would have challenged for cause, and if the challenge was overruled, would have used one of his extra peremptories to strike Ms. Horton.

18. By failing 1) to ensure that the jury questionnaires were adequate, 2) to question the jurors about answers written on the jury questionnaires, 3) to intelligently exercise challenges for cause and peremptory challenges, trial counsel rendered ineffective assistance of counsel.

CLAIM 96: Failure to Conduct an Effective Voir Dire to Ascertain Juror's Attitudes and Biases Regarding the Death Penalty Constituted Ineffective Assistance of Counsel.

1. During voir dire, the court excused several potential jurors who indicated a general opposition to the death penalty. Trial counsel routinely failed to ask any questions of these people to explore whether they would automatically return a sentence of life without possibility of parole in every case. He never asked whether they could imagine a situation in which they would be willing to consider rendering a sentence of death.

2. Trial counsel asked no questions at all of prospective jurors Charles Bomar (RT 801), Josefina Docuyanan (RT 1135), and Charles Boxx (RT 804). Counsel engaged in virtually no questioning of several jurors who initially appeared to be biased against the death penalty, including Mitsue Estrella (RT 1173), Maria Gutierrez (RT 1288) and Oliver Neal (RT 1654).

3. Trial counsel failed to make any attempt to rehabilitate jurors regarding death-qualification. Pamela Elofson was asked "Would you automatically vote for a verdict other than first degree in order to avoid having to worry about the death penalty." She responded that she would. The court repeated "You would? Mr. Larkin?" Larkin responded "No questions." The court excused Elofson on his own motion. (RT 1141).

4. The court asked prospective juror Julietta Lopez, "would you refuse to vote for [the death penalty] because you know by voting for something other than first degree murder there wouldn't be a death penalty?" Ms. Lopez responded that she would. The court said: "You would. My reaction is to excuse her, gentlemen, unless either side objects." Millett volunteered, "No objection." Larkin remained silent. The court explained, "Then, Mrs. Lopez, I'll excuse you at this time." (RT 1542).

5. The court asked Elva Cazares, "Would you vote for something other than first degree murder so that you wouldn't even have to get to the death penalty?" Cazares responded "Yes, I think I would." The court rephrased the question and asked again. Cazares responded "just to sum it all up, I don't believe in the death penalty." The court asked "you don't believe in the death penalty?" Cazares responded that she did not. The court said "very well then. Mr. Larkin?" Larkin responded, "No questions, your honor." (RT 1031).

6. Petitioner was entitled to the effective assistance of counsel at trial, including during voir dire. The inaction of trial counsel deprived petitioner of a meaningful voir dire examination. The result was the seating of a jury biased in favor of the death penalty, violating petitioner's rights under the Sixth, Eighth and Fourteenth Amendments. The omissions of trial counsel deprived petitioner of his right to effective assistance of counsel under the Sixth Amendment. *See e.g., Strickland v. Washington*, 466 US 668 (1986).

7. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 505 U.S. 719, 729 (1992). The Supreme Court has explained:

> Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so.

Id. at 733-34 (emphasis in original). Trial counsel completely abandoned his responsibility to assure the adequacy of the voir dire. "Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Id.* at 736. Trial counsel's actions effectively eviscerated petitioner's rights to a meaningful voir dire.

8. At times, trial counsel was not paying attention to the proceedings. When prospective juror William Boxx said that he would not vote for the death penalty for any person, the court invited trial counsel to question the juror. Trial counsel did not respond to the court. The prosecution made a challenge without argument, which the court sustained without comment. (RT 804).

9. Effective capital case counsel would have done something. No tactical purpose existed to simply ignore the court. The record reflects that trial counsel was not always paying attention to the proceedings. Responding to a question from the trial court, prospective juror Shirley Cerda explained, "I'm not really not sure of the situation, but I was a molested child myself. But I feel if it has anything to do with that I do not feel I would be appropriate for this case," The court took the initiative and excused Ms. Cerda: "Based upon the facts of this case I will excuse you on my own motion." The court then thanked and admonished Ms. Cerda, before excusing her. After she departed, trial counsel asked "Did she say she has been molested?" (RT 1039). Petitioner was entitled to counsel who could at least pay attention to the proceedings.

10. Effective capital case counsel would have attempted to rehabilitate those jurors who might have been willing to consider voting for death under some circumstance. Counsel's failures violated petitioner's Sixth Amendment right to effective assistance of counsel. The jury which was seated was biased in favor of death as a direct result of trial counel's inadequacy, in violation of petitioner's rights to a fair trial by an impartial jury in

violation of the Fifth, Sixth and Fourteenth Amendments. Petitioner's rights to heightened capital case reliability under the Eighth Amendment were also violated.

11. During voir dire, trial counsel passed for cause on several prospective jurors who were ultimately seated as jurors. Several should have been challenged for cause and excused.

12. Arthur Beckner admitted that he was close to his nephew who worked for the Los Angeles County Sheriff's Department. He also had granddaughters ages 12 and 14, about the age of the victims. (RT 724). Trial counsel asked a single, rhetorical question: "You understand that we have some young people that are involved as victims in the case?" This question did not elicit sufficient information to make a reasoned determination as to Mr. Beckner's possible biases. The issue of whether the jurors grandchildren might make him react to the murders more strongly than if the victims were adults, or even children of different ages, was left unbroached. Trial counsel could not intelligently exercise challenges for cause or peremptory challenges without necessary information.

13. The court asked Robin Kritz, "would you be inclined to believe a witness who was a police officer more than a civilian witness simply because the first witness was a police officer and for no other reason?" After having the question repeated, she responded "yeah." The court rephrased the question: "Okay. You think if a police officer said the car was going 40 miles an hour and the doctor was standing on a street corner and said it was going 35 miles an hour you would believe the police officer simply because he or she was a police officer?" Ms. Kritz, "Well, no, not because of he was a police officer." (RT 1497).

14. The court's question was imprecise. It asked whether she would believe a police officer over a doctor or teacher. The witnesses in petitioner's case were not all respected professionals. The questions and her answers were at best ambiguous. Her answers implied that she would tend to believe police officers over other witnesses. It was clear that numerous police officers would testify against petitioner. Their credibility was

critically important. Her inability to be impartial mandated a challenge for cause.

15. Trial counsel asked only cursory questions, prompted by Ms. Kritz's responses on the jury questionnaire, "You have some friends of the family or friends of yours that are sheriff's officers or police officers. Do you think that you'd be able to put that out of your mind?" Ms. Kritz responded, "Yeah." Trial counsel then asked: "And you wouldn't vote a certain way or not want to vote a certain way just because of that would you?" "No." Not only did this question lead the witness to respond in the negative, it was ambiguous and was not probative. Trial counsel failed to explore whether or not the prospective juror might find a witness who was a member of law enforcement more credible or not. Trial counsel failed to render effective assistance of counsel by: 1) performing inadequate voir dire; 2) passing for cause when he should have challenged; and 3) not exercising a peremptory challenge.

16. Prospective juror Patricia Kieran was close to her niece who was a dispatcher with the police department and whose husband was a police officer. Trial counsel failed to pursue whether her relationship with members of law enforcement might color her assessment of the credibility of witnesses. (RT 1447). If counsel was not going to question the juror, at a minimum he should have exercised a challenge. He neither challenged for cause or struck the juror with a peremptory.

17. Later, it came to light that prospective juror Deberah Zinn knew one of the prosecution's witnesses, Officer Barclift of the Bell Garden's Police Department. This fact did not come out during voir dire as trial counsel failed to ask if Ms Zinn knew any of the witnesses, or probed into whether she knew any law enforcement officers. Ms Zinn had also been a victim of a robbery while she worked at her mother's jewelry store.

18. Petitioner was entitled to a fair trial before impartial jurors. Trial counsel failed to advocate on petitioner's behalf by conducting a searching inquiry of the juror's attitudes and biases. Selecting an impartial jury was thus impossible, as demonstrated by

counsel's inadequate use of challenges. Counsel's failings fell below the standard of care required of competent capital case counsel under the Sixth Amendment, as interpreted by *Strickland* and its progeny.

CLAIM 97: Trial Counsel Rendered Ineffective Assistance for Failing to Excuse a Juror Who Knew One of the Witnesses.

1. During trial, it came to light that one of the jurors knew one of the prosecution's key witnesses, Officer Barclift of the Bell Gardens Police Department. Barclift was an investigator during the 1976 double homicide. He interrogated petitioner about the 1976 killings after petitioner's arrest in 1978. (RT 2339).

2. Juror Zinn was employed at a casino. Officer Barclift served as a police liaison for the casino. He worked closely with the personnel department in which she worked. (RT 2340). He saw her on a daily basis. (RT 2340). He was responsible for performing identity checks on all applicants for employment. (RT 2350).

3. The trial judge suggested, "If you want, gentlemen, I will ask her some individual questions, if you want. Based on that I'd excuse her, too, but I'd leave it up to you." (RT 2340). Trial counsel did not excuse the juror, even after she admitted to knowing Officer Barclift during questioning.

4. The Sixth Amendment and Due Process clause of the Fourteenth Amendment protect petitioner's right to an impartial jury.

> The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257; *Tumey v. Ohio*, 273 U.S. 510 "A fair trial in a fair tribunal is a basic requirement of due process" *In re Murchison*, 349 U.S. 133, 136). In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' His verdict must be based upon the evidence developed at the trial.

Turner v. Louisiana, 379 U.S. 466 (1965).

5. Jury trial rights are subverted when jurors know key prosecution witnesses.

People v. Tidwell, 3 Cal. 3d 62 (1970). "Determining whether any of the prospective jurors know the witnesses is clearly important to the question of the jurors' impartiality. *See United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S. Ct. 1351, 67 L. Ed. 2d 336 (1981); *United States v. Jackson*, 508 F.2d 1001 (7th Cir. 1975); *see also Cook v. United States*, 379 F.2d 966 (5th Cir. 1967); *United States v. Brown*, 799 F.2d 134. (1986). The danger is that the juror will give more weight to the testimony of that witness than to the witnesses of the opposing party.

6. Where the witness is a police officer or deputy Sheriff the danger is even more pronounced:

> It would have undermined the basic guarantees of trial by jury to permit this kind of an association between the jurors and two key prosecution witnesses who were *not* deputy sheriffs. But the role . . . as deputies made the association even more prejudicial.

Turner v. Louisiana, 379 U.S. 466 (1965).

7. It was incumbent on trial counsel to excuse the juror after she verified that she knew Officer Barclift. The trial judge himself suggested that he would remove the juror if he were trial counsel. Both the judge and trial counsel questioned the juror. She told the court that she saw Officer Barclift every day at her job. The two sometimes engaged in conversations and knew one another casually. Juror Zinn knew Officer Barclift enough for her to form a bias. The failure to excuse the juror constituted deficient performance.

8. The failure to excuse Juror Zinn prejudiced petitioner. After she was examined and allowed to return to the jury box, Officer Barclift testified for the prosecution. He primarily described the scene of the crime as he found it, and identified pieces of physical evidence in crime scene photographs. (RT 2355). Later in the trial, he was called back to the stand by the prosecution. He then described the confession he elicited from petitioner in detail. (RT 2496). He described both the circumstances of the

confession, including the alleged *Miranda* waiver, and the contents of the purported confession. Officer Barclift recited almost a verbatim account of the confession, recounting the way in which petitioner purportedly killed the boys in graphic detail. Barclift repeated gratuitous, prejudicial comments, such as stating that petitioner said "I have a thing for blondes" several times, despite the fact that the Carter's notes of the alleged confession only say it once. (RT 2498).

9. Both the accuracy and voluntariness of the confession was contested by the defense. The defense asserted was that petitioner was coerced, received false promises in exchange for incriminating statements and that the resulting confession itself was false. Trial counsel conceded that petitioner killed Carter but denied petitioner's guilt in the 1976 killings about which Barclift testified. Barclift's testimony was critical to one of the disputed facts at the guilt phase.

10. Barclift also explained that he did not divulge to the media that the top had been cut off from the plastic container found at the scene. He kept the fact confidential so that the police would know if a confession was false or not. (RT 2504). This testimony was perhaps the most damaging of the entire trial, since the jury was being told that only the killer knew this fact and that petitioner knew that fact. The defense was never told that the details about the bottle were withheld from the public, even though a discovery order ordered the disclosure of that information. The trial court refused to allow counsel to bring out the discovery order on cross-examination. (RT 2521). Barclift was thus not as significantly impeached as he otherwise might have been.

11. A juror who was prone to believe that Officer Barclift was credible based on knowledge outside of the courtroom would be led to believe that the confession was accurate and voluntary, that the *Miranda* warnings were validly given and voluntarily waived and that petitioner killed the two boys in Ford Park in 1976. Barclift's testimony amounted to an assertion of petitioner's guilt. The failure to excuse Juror Zinn was thus prejudicial.

Trial counsel's inadequate representation violated petitioner's Sixth Amendment rights.

CLAIM 98: Petitioner's Right to Effective Assistance was Violated as a Result of Counsel's Failure to Conduct an Adequate Voir Dire.

1. Trial counsel conducted the voir dire of the jurors in a manner that was constitutionally inadequate. The trial record was analyzed by Professor Edward J. Bronson, whose declaration is incorporated by reference as if set forth in full. He states:

> Based on my review of [the] materials and on my training and experience, it is my professional opinion that petitioner was not afforded effective assistance of counsel in the voir dire. . . . The errors were serious, are at variance with commonly accepted professional practice, and cannot be explained or justified as tactical choices. The errors, taken together and individually, severely undermined the defendant's right to have an unbiased jury as expected of a reasonably competent attorney. Specifically, it is my opinion that petitioner's trial counsel's performance fell below objective standards of reasonableness under prevailing professional norms. It is also my opinion that this inadequate performance was prejudicial to petitioner in that there would have been, absent counsel's errors and omissions, a more favorable outcome.

Exhibit BB, Declaration of Edward J. Bronson at 4.

2. Trial counsel demonstrated, through the voir dire, a lack of understanding of the purpose of voir dire and an inability to use basic questioning techniques to accomplish those purposes. Exhibit BB at 5.

3. Counsel consistently used leading questions that failed to elicit useful answers, on which he could base an intelligent decision to accept or challenge the prospective juror.

4. Counsel failed to follow up on matters that needed further elucidation.

5. Counsel was unwilling to even attempt to rehabilitate jurors, and when he did, he often ended up rehabilitating jurors as if he were prosecuting the case.

6. Trial counsel's voir dire was inadequate in several areas of inquiry, including pretrial publicity (Exhibit BB at 7-21), death qualification (Exhibit BB at 12-35), pedophilia and homosexuality (Exhibit BB at 35-39), and other areas, including joinder and petitioner's failure to testify (see Exhibit BB at 39-51).

7. Petitioner requested that counsel hire a jury expert to help in conducting the voir dire and selecting the jury. Although it is not ineffective assistance *per se* to fail to hire an expert, in this case, given trial counsel's complete inadequacy to conduct a competent voir dire, failure to hire a qualified person to assist at voir dire constituted ineffective assistance of counsel.

8. Petitioner was prejudiced by his trial counsel's inadequate performance. Absent counsel's numerous errors and omissions, it is likely that there would have been a more favorable outcome at both the guilt and penalty phases. Accordingly, petitioner was denied his rights to counsel, to a fundamentally fair trial, to a jury trial, and to a reliable and accurate determination of sentence under the Sixth, Eighth and Fourteenth Amendments.

4. CONFLICT OF INTEREST ISSUES.

CLAIM 99: Petitioner was Denied his Right to the Assistance of Counsel Under the Sixth Amendment by the Trial Court's Denial of his Request to be Represented by Counsel to Litigate the Critical Proceedings Challenging the Inadequate Representation by his Appointed Trial Counsel, Prior to and After the Guilt Phase of the Trial.

1. At the first trial in 1979, a conflict arose between petitioner and his counsel, Peter Williams, which intensified at the conclusion of the guilt phase. Petitioner explained to the trial court that he and Mr. Williams "have had a complete and total breakdown of communications." (1979 RT 894). Petitioner asked that the Court appoint another attorney to represent him.

2. The Court was hesitant to discharge Mr. Williams but, ultimately, agreed to relieve Mr. Williams. The trial court trailed the matter until the next day for the appointment of new counsel. (1979 RT 900). Prior to doing so, the Court noted that "I cannot permit him [Mr. Memro] to proceed in pro per" and "There is no circumstances under which he can. This is a death penalty case." (1979 RT 898).

3. The following day, the Court appointed Robert Villa to represent petitioner.

(RT 902). Petitioner objected to Mr. Villa serving as counsel based on their conversations and stated that he saw no alternative other than to submit for sentencing on the previous proceedings, due to his lack of qualifications to serve as his own attorney. (1979 RT 903-904). The Court stated:

> The request to proceed in propria persona is denied.
> The Court cannot permit a person who feels that he is not qualified to do so to represent himself in a case where his life is at stake.

(1979 RT 904).

The court declined to relieve Mr. Villa and gave Mr. Villa his requested time to prepare. (1979 RT 905-913).

4. Upon returning to court, Mr. Villa explained that a conflict had "arisen between Mr. Memro and myself which go[es] to my ability to continue to represent Mr. Memro." Mr. Villa stated that he could not go into these matters with the trial court, which was sitting as the trier of fact. (1979 RT 914). The trial court transferred the matter to Judge Allen. (1979 RT 916). Upon Mr. Villa's request, he was removed as counsel. (1979 RT 916). The court ordered Mr. Villa to return the transcripts, reports and correspondence to petitioner. (1979 RT 918-919).

5. The court then asked if petitioner was ready to proceed and petitioner said he was not. Petitioner believed that the court would appoint new counsel. The court said that unless he could retain his own attorney, he would have to proceed on his own. (1979 RT 920). The court gave petitioner nine days to prepare himself for the penalty phase. (1979 RT 925).

6. At the next appearance, petitioner again requested a continuance and appointment of counsel. The court refused this request. (1979 RT 927). Petitioner reminded the court that Mr. Villa was relieved on his own motion. Petitioner also reminded the court that he was not competent to represent himself. (1979 RT 928). Despite the court's prior pronouncements that under no circumstances could a defendant

represent himself in a capital case, the court denied petitioner's request that counsel be appointed. (1979 RT 928). Petitioner explained that he lacked adequate resources at the county jail and that even if he had adequate resources, he was not qualified to represent himself. (1979 RT 929). The court refused to appoint an attorney. (1979 RT 929). The court offered an additional continuance and petitioner reiterated that regardless of the amount of time, he was unqualified. (1979 RT 930). The trial court continued the matter 21 days and appointed an investigator for petitioner. (1979 RT 932).

7. Petitioner was unable to proceed at the next appearance, due to his inability to confer with the appointed investigator. (1979 RT 935). The trial court denied petitioner's request for a continuance. (1979 RT 937). Petitioner again renewed his request for appointed counsel, which the court denied. (1979 RT 939-41).

8. Petitioner again reminded the court that he was not competent to represent himself as the court had previously found. (1979 RT 941). The court reversed its prior statements, *see above*, and said that the court only found that petitioner did not feel he was competent to represent himself. (1979 RT 941).

9. The penalty phase began with petitioner representing himself. The prosecution rested on the evidence presented during the guilt phase. Petitioner stated that because he was unqualified to represent himself and the court refused to ensure his access to a licensed investigator, he had nothing to add. (1979 RT 942-43).

10. The prosecutor argued that if petitioner did not deserve the death penalty, there was no case in which it would ever be justified. He urged the court to impose the death penalty. (1979 RT 944-45). Petitioner stated he was not qualified to proceed. (1979 RT 945). The court construed petitioner's statements as his refusal "to make any summation whatsoever in his own defense." (1979 RT 945). The court then entered a death verdict against petitioner. (1979 RT 949).

11. The complete denial of counsel violated petitioner's Sixth Amendment

rights. "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 668 (1984). The Supreme Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding. *See, e. g., Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612-613 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (*per curiam*); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475-476 (1945).

12. The trial court refused to appoint counsel to represent petitioner in the penalty phase. There can be no doubt but that the penalty phase is a critical phase of the trial. *See, e.g., Estelle v. Smith*, 451 U.S. 454 (1981); *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001); *Gerlaugh v. Stewart*, 129 F.3d 1027 (9th Cir. 1997) (applying *Strickland* and *Cronic* to penalty phase representation).

13. The trial court's sole ground for not appointing counsel was that two prior attorneys had been dismissed. Peter Williams had been relieved after an irreconcilable conflict of interest arose. (1979 RT 900). This removal was necessary and proper under the Sixth Amendment. *See People v. Marsden*, 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970). The essence of a *Marsden* motion is that appointed counsel's representation has in some significant measure fallen below the level required by the Sixth Amendment. *See Schell v. Witek*, 218 F.3d 1017, 1021 (9th Cir. 2000).

14. Robert Villa was relieved upon his own request. (1979 RT 916). The court attributed, without factual basis, Villa's motion to be relieved to petitioner and repeatedly refused to appoint counsel despite petitioner's numerous requests.

15. As a result of the above, petitioner was denied his right to counsel under the

Sixth and Fourteenth Amendments.

CLAIM 100: Petitioner's Rights Were Violated as a Result of Counsels' Conflict of Interest in Being Essential Witnesses in the Case.

1. Attorneys Carney and Larkin were both essential witnesses in the case. Under California ethical rules, they were not allowed both to serve as counsel and to testify as witnesses. They decided not to be witnesses. Consequently, petitioner was denied the testimony of critical witnesses. Neither attorney consulted with petitioner about this decision.

2. Carney was a corroborating witness as to the testimony of defense witnesses at the motion to suppress petitioner's confession.

3. Jose Feliciano was a witness who had been hypnotized by the police in violation of state law requirements. Larkin interviewed Feliciano out of the presence of any investigator, at which time Feliciano denied having identified a photograph of petitioner. A few minutes later, Larkin put Feliciano on the stand and Feliciano said the opposite. Had Larkin interviewed him in the presence of an investigator, the investigator could have provided "prior inconsistent statement" testimony. Absent the presence of an investigator, Larkin turned himself into an essential witness in the case.

4. In *Cuyler v. Sullivan,* 446 U.S. 335 (1980), the Supreme Court explained that a defendant is entitled to a presumption of prejudice if he can demonstrate that his attorney labored under an actual conflict of interest and that the "actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348-49; *see also Strickland*, 466 U.S. at 692. As demonstrated here, trial counsel's performance was constitutionally inadequate.

5. Petitioner was not informed that he had a right to conflict-free representation. He never waived his right to such representation. Similarly, he was never provided with independent counsel to discuss whether conflicted counsel should remain on the case or even told that he could do so. Had the court provided independent counsel, they

would have explained petitioner's rights and petitioner would have exercised his right to conflict-free representation.

6. The lawyers' inability to testify caused by their choice between testifying and continuing as counsel for petitioner prejudiced the presentation of his case and denied him his rights under the Sixth and Fourteenth Amendments.

CLAIM 101: The Trial Court Failed To Conduct The Constitutionally Required Inquiry Into the Conflict of Interest.

1. The trial court was constitutionally required to inquire into the circumstances of the conflict in order to determine whether new counsel was needed. This duty was independent of any asserted waiver of the conflict by petitioner, who was in any case incapable of meaningful waiver by virtue of his mental condition.

2. The trial court did not make the requisite inquiry. On numerous occasions, petitioner sought to have counsel relieved and still the court did nothing. The court recognized that there was impropriety to having counsel serve as a witness but did nothing to look into the constitutional nature of those difficulties. (RT 378-384). Nor did the court inform petitioner of his right to conflict-free representation.

3. The failure of the trial and reviewing courts to accord petitioner a meaningful hearing regarding this conflict deprived him of his Sixth Amendment right to counsel and associated Eighth and Fourteenth Amendment rights to a fair and reliable capital trial.

5. GUILT PHASE ISSUES.

CLAIM 102: Trial Counsel Rendered Ineffective Assistance by Failing to Impeach Dr. Choi with his Preliminary Hearing Testimony.

1. At the 1987 trial, Dr. Choi testified regarding the autopsy performed on Carter. Dr. Choi testified that the result of an anal swab test was negative for sperm, spermatozoa and two plus for acid phosphatase. (RT 2430). He explained that four plus was the maximum strength and that two plus was mildly positive.

2. Dr. Choi testified that the enzyme acid phosphatase comes from the prostate.

He explained that the victim would not naturally have his own prostate fluid enzyme in the anus. The enzyme had to have come from somewhere else– probably another person. (RT 2430-31).

3. Dr. Choi testified that acid phosphatase is a part of semen. (RT 2431).

4. As discussed herein, the prosecutor argued that the Carter killing was first degree murder based on two theories– (1) that it was an intentional, premeditated and deliberated murder, and (2) that it was a murder committed in the course of a felony, namely lewd and lascivious conduct. The prosecutor stated:

> Now, as to Count 3, the murder of Carl Carter, Jr., there are two theories. One is it could be a willful, deliberate, premeditated murder, or it could be a murder that occurred during the course of a felony. The felony– during the course of attempted felony or a completed felony– that of child molest.

(RT 2786).

5. The prosecutor, after summarizing the evidence from petitioner's purported confession, stated:

> Well, I think if you think about it, and considering that he taped his hands behind his back– anybody here believe he did that after he was dead? These things didn't happen exactly the way Mr. Memro has stated it. These happened more than likely while he was attempting some sort of a child molest, some sort of a sexual advance or attack on this boy.

(RT 2789). These comments demonstrate that the prosecutor actively sought to try petitioner based on both theories of first-degree murder, despite petitioner's acquittal of the felony-murder special circumstance.

6. He continued:

> He had had some sexual relations with this young boy. He couldn't possibly let him go back and tell his father or anyone else. And there was only one thing left to do then, and he took that clothesline and, as he described, tied it in a square knot, something that presumably he remembers, and choked him to death.

(RT 2789).

7. In rebuttal, the prosecutor argued:

> Does anybody have any doubt that Carl Carter, Jr. was in the process of being molested? I don't think so.

(RT 2845).

The prosecutor strongly argued the felony murder theory later as well.

> 8. The prosecutor stressed the felony-murder theory:
>
> It was said that we don't have to be concerned with anything that Dr. Choi had to say. He's neutral. I don't think that's quite true. I think what Dr. Choi had to say regarding especially the phosphatase test, I think, goes a long way toward refuting Mr. Memro's statement that he was, as he puts it, unable to get a hard on.

(RT 2851).

9. Considering the emphasis the prosecutor placed on the felony-murder theory, there was no tactical reason not to attack evidence supporting that theory.

10. At the preliminary hearing conducted on November 13, 1978, Dr. Choi testified about Carter's autopsy. The following colloquy took place:

> Q: And the autopsy that you did involving a subject Carl Carter, did you make any particular examination of his anus?
> A: Yes.
> Q: Did you find anything unusual or extraordinary about his anus?
> A: It was decomposed and it was difficult to assess, but there was circular end and a longitudinal operation in the anus.
> Q: Were there any unusual or – did you take any tests of any substances found in the anus – were there any other– withdraw the question.
> Were there any foreign substances found in the anus?
> A: Of a remarkable nature? Not visibly. I didn't see anything.
> Q: Not visible?
> A: No. But it was decomposed and it was difficult to tell.
> Q: So there is nothing– there was nothing unusual about the anus consideration, the decomposition; is that a fair statement?
> A: Well, there was some degree of abrasion, circular abrasion, and longitudinal operation, but it is difficult to tell how extensive it was before the decomposition.
> Q: You could not make any judgments as to the cause or how long– the cause or those abrasions or how long they had been there or anything like that?
> A: That's right. It is difficult to tell.

(Preliminary Hearing Transcript at 9-10).

11. The lack of any mention of acid phosphatase during the preliminary hearing testimony severely undercut the credibility of Dr. Choi's testimony at the 1987 trial. Trial

counsel inexplicably failed to impeach Dr. Choi with his preliminary hearing testimony.

12. Reasonable counsel would have done so. The failure to do so was prejudicial, as it would have contradicted the prosecutor's theory that the Carter killing was a felony murder. This failure violated petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights. See Exhibit P.

CLAIM 103: Trial Counsel Rendered Ineffective Assistance By Failing to Challenge the Statements Based on Contradictory Witness Testimony and Inconsistencies Between the Two Confessions.

1. Throughout the investigation following the Fowler and Chavez killings, two suspects were described as having been seen with the boys at the park on the night of the murders. Suspect One was described as a white male, approximately age 30, with sandy blond, shoulder length hair and a two inch scar across his cheek. He was seen the night of the murder wearing an army jacket. Suspect Two was described as a younger man with wavy brown hair, wearing a brown jacket. Suspect Two arrived at the park that night on a motorcycle.

2. Scott Feliciano, who saw the men in the park shortly before the murders, was brought to the LA Sheriff's Department and helped the Sheriffs' sketch artist draft a composite sketch of Suspect One. The composite was then shown to witnesses and published in the local media.

3. There are two confessions purportedly given by petitioner. One confession was purportedly handwritten by Detective Lloyd Carter contemporaneously with the confession the defendant allegedly gave on October 27, 1978 at midnight, in the South Gate police department. A typewritten police report dated three days later on October 30, 1978, signed by Officers Barclift and Rogers of the Bell Gardens police department, includes a second confession of the same events, allegedly given the day after the first confession.

4. There are marked discrepancies between the purported confessions and the witness statements. Trial counsel failed to bring out these discrepancies before the jury.

Having made the decision to defend petitioner on the theory that petitioner was not guilty of the crimes, it was critical that trial counsel introduce and explain evidence calling into question the validity of the prosecution's theory. There was no strategic reason not to bring out these contradictions and inconsistencies.

5. The typewritten statement attributes the following statement to petitioner: "I guess I got to the park about three in the afternoon. I had come there from my house at 2446 ½ Cudahy St., Huntington Park." The handwritten version of the confession says that petitioner lived in "Walnut Park" instead of Huntington Park. Witness Audie Cullison, a friend of Scott Fowler, told detectives that he had seen Suspect One at the park before, earlier in the week. Suspect One had met Cullison and Fowler at the park while they were fishing and had said that he was from Paramount. (Bell Gardens Police Report dated 9/13/76, signed by Bowers; marked as discovery page 313).

6. The typewritten statement attributes the following statement to petitioner: "I rode my **red** Yamaha 125 cc and I was alone." Witness Jose Feliciano described the suspect's motorcycle as **yellow** with a green gas tank and black motocross handlebars. He saw the two suspects frequently talking and whispering together, as if they "were planning something." (Det. Gossett Interview of Jose Feliciano, dated 7/26/76). At trial, Feliciano was questioned on re-direct: "Q: did they know each other? A: yeah, when they met they were like all buddies." (RT 2329). Witnesses Scott and Mary Bushea also saw the two suspects together that evening as well. (Bell Gardens Police Report dated 7/26/76, signed by Det. Gossett; marked as discovery page 22). The handwritten confession neither specifies that he was alone nor makes any mention of a second suspect.

7. The typewritten statement attributes the following statement to petitioner: "I brought my camera, a 35mm Minolta, and was shooting pictures of a soccer game going on at the park. I'm a pretty good photographer. I have all of my own equipment and do some of my own developing. While I was shooting some color slides I saw these two boys

fishing at the pond. . ." No one was seen walking through the park from a soccer game taking pictures as the confession indicates. Jose Feliciano saw Suspect One arrive on foot from the river bed that runs alongside the park, enter through a hole in the fence and walk directly to the pond where the boys were fishing. He then approached the boys and asked "Catch anything yet?" to which Scott Fowler responded, "yeah, stick around and watch us catch some more." The other suspect was seen a short time later arriving at the park on a motorcycle. (Bell Gardens Police Report, dated 7/29/76, signed by Detective Eckert). Both suspects were seen entering the park from locations other than the soccer field and they were the only two men seen with the boys until at least 10:00 p.m. that night, when Jose Feliciano, Scott Bushea and Mary Bushea all departed.

8. The typewritten statement attributes the following statement to petitioner: "I had never seen either of them before. I started shooting pictures of them while they were fishing." Witness Audie Cullison said that he encountered Suspect One at the pond earlier in the week while he was fishing with Scott Fowler. Cullison and Fowler had been fishing together at the pond for three consecutive days. On the second day, Suspect One approached them and asked "how many fish you caught?" He then stood and stared at Scott Fowler for about five minutes before finally walking away. (Bell Gardens Police Report dated 9/13/76, signed by Det. Bowers; marked as discovery page 311). Even after police searched the defendants home and seized all photographs, negatives and exposed but undeveloped film, no pictures of the boys were recovered. (Bell Gardens Police Report dated 10/30/78, signed by officers Barclift and Rogers, page 4 of 5; Bell Gardens Police Report dated 10/30/78, signed by officers Barclift and Rogers page 1 of 2). No witnesses mentioned anyone taking pictures or any presence of a camera at the park that night.

9. The typewritten statement attributes the following statement to petitioner: "The three of us talked for a long time, hours. We stayed at the pond until dark." This statement implies that petitioner was with the boys continuously for hours before dark.

Jose Feliciano said that the boys did not arrive until after 7:00 that night and the two suspects arrived some time after that. (Det. Gossett Interview of Jose Feliciano, dated 7/26/76). An employee at a nearby fast food restaurant corroborated Feliciano's statement, confirming that he saw the boys leave for the park at about 7:00. (Bell Gardens Police Report dated 7/26/76, signed by Detective Bya)l. The handwritten confession says that the boys arrived "shortly before dark" and that they talked "for a long time."

10. Witness accounts contradict the assertion that the two suspects were with the boys for several hours. Jose Feliciano saw Suspect Two leave to go get beer at about nine o'clock and return five minutes later with what appeared to be a six-pack of beer, which both suspects drank. (Interview with Jose Feliciano; Bell Gardens Police Report dated 7/29/76, signed by detective Eckert). An employee working at a liquor store that evening and a customer who was in the store at the time both told officers that they had seen a man matching the description of Suspect Two arrive at the store before ten o'clock on a yellow motorcycle with black motocross handlebars and purchase a six pack of beer. (Bell Gardens Police Report dated 8/2/76, signed by Officer Christy; Bell Gardens Police Report dated 8/2/76 signed by Detective Bower). Nowhere in the purported confession is there mention of petitioner separating from Fowler and Chavez for any reason. Instead, the confession states that petitioner drank beer before he went to the park, but makes no mention of purchasing and consuming beer at the park. If the men did not meet the boys until well after 7:00 pm, and left to get beer at about 9:00, the men were not talking for hours continuously, nor were they in the park together for hours before dark.

11. The confession also indicates that petitioner was alone with the two boys. Three witnesses, Scott Bushea, Mary Bushea and Jose Feliciano, all saw two suspects together with the two boys.

12. The typewritten statement attributes the following statement to petitioner: "After dark, Scott said that he needed something to put the fish in that he had caught. He

said that he remembered that when he walked to the park on Clara St., he had seen a plastic gallon milk bottle lying on the street, just the other side of Jaboneria street. I told him to get on the back of my motorcycle and we would go get it. He got on my bike and we rode down the street in front of the park until we got to Garfield Avenue. Then we went north to Clara street and then west to about one block past Jaboneria street. That's where we found the plastic bottle." Jose Feliciano and Scott Bushea were near the boys at the park until 10:00 p.m. and never saw Scott Fowler leave on the motorcycle. At trial, Jose Feliciano was asked if he saw "either one of those two boys, Scott or Ralph, go off with – go away with one of the men?" He responded, "no." (RT 2314).

13. Mary Bushea, the mother of Scott Bushea clearly saw a white plastic container in the boys' possession before she left the park with her son. (Bell Gardens Police Report dated 7/29/76, signed by Detective Eckert. Only one white plastic container was recovered at the crime scene. The purported confession states that the two did not return with the milk bottle until about 11:00 p.m., well after Mary Bushea had left. Mary Bushea's statement contradicts the purported confession, since she couldn't have seen the milk bottle according to petitioner's alleged confession to the police.

14. The typewritten statement attributes the following statement to petitioner: "On the way back, a bunch of guys in a car drove along side of us and shouted, 'Hi, Scott.' He said that they were some of his friends. It must have been eleven when we got back to the pond, its hard to remember." Exhaustive interviews with all of Scott Fowler's friends and acquaintances never turned up any evidence of a car driving by. The case was well publicized and no one came forward with information about the car.

15. The typewritten statement attributes the following statement to petitioner: "[A]ll of a sudden, [Scott] made this comment about 'All these fucking faggots' and I got pissed off. The next thing I knew, I had him from behind, around the neck. I got my pocket knife out after I got him down on his stomach, with my knee in his back. I pulled his head

back and cut his throat with one cut." The confession in the police report said that a pocket knife was used. The handwritten version of the confession stated that it was a 2 ½ inch pocket knife. The knife Jose Feliciano saw strapped to the leg of the man in the composite was a large hunting knife. (Det. Gossett Interview of Jose Feliciano, dated 7/26/76).

16. The coroner concluded that the knife was a "heavy weapon." (See autopsy reports of Scott Fowler and Ralph Chavez dated 7/27/76; Bell Gardens Supplemental Police Report dated 7/27/76, signed by Detective Gardner). The coroner's conclusion was based in part on the existence of a second laceration on Scott Fowler's shoulder. The coroner said that the second laceration, measuring 2 1/4 inches in length, was caused by the tip of the knife "as the suspect was cutting the victim's throat." The fact that there was only one cut inflicted, although two lacerations may have resulted, could be consistent with the confession. The 2 1/4 inch laceration caused by the *tip* of the knife as the knife slid along the throat indicates that the tip was in contact with the victim's shoulder for about half of the time the knife blade was in contact with the throat. The blade of the knife purportedly used was only 2 ½ inches long. This blade could not have inflicted the shoulder wound as it was drawn across the throat. The coroner concluded that the knife was a heavy weapon, which corroborates the witness testimony that one of the suspects had such a weapon.

17. Trial counsel failed to highlight this critical information. (See Autopsy Reports of Scott Fowler and Ralph Chavez dated 7/27/76; Bell Gardens Supplemental Report dated 7/27/76, signed by Detective Gardner). A heavy hunting knife would match both the description given by Jose Feliciano of the knife possessed by Suspect One at the park the night of the murder and the coroner's conclusion of the type of knife that was most likely used in the killing.

18. The typewritten statements attributes the following statement to petitioner: "I went straight home, but couldn't sleep for most of the night. I've still got the jacket I had on that night. Its an old army fatigue jacket with lining. Its got an army patch on over the

left breast. It's still got the blood spots on it." The 'confession' indicates that Reno was both the man on the motorcycle and the man in the green fatigue jacket, whereas all witnesses present clearly saw two distinct people. Suspect Two arrived on a motorcycle and Suspect One, wearing the green army jacket, was seen arriving on foot. According to the witnesses, the man with the Army jacket did not have a motorcycle and the man with the motorcycle did not have an Army jacket.

19. The typewritten statement attributes the following statement to petitioner: "there was blood all over everything, including me" and in the handwritten notes Reno purportedly said "I had blood all over me." The police seized numerous jackets and pairs of pants from petitioner's apartment. They never found a blood-soaked jacket, as would have been consistent with the purported confession.

20. At the end of the typed statement, petitioner allegedly said that he is quite sure there was no fishing box on the scene. Two witnesses, Jose Feliciano and Mary Bushea said that they had seen a tackle box in the boys possession at the park that evening. (Exhibit S-A, Bell Gardens Police Report by Det. Eckert, dated 7/29/76).

21. There was no strategic reason not to bring out these contradictions and inconsistencies. Having chosen to contest guilt on these counts, trial counsel was obligated to point out such inconsistencies. Trial counsel failed to exercise the care required by the Sixth Amendment and had counsel done so it is reasonably likely that petitioner would have been found not guilty.

CLAIM 104: Trial Counsel Rendered Ineffective Assistance for Failing to Impeach Witness Jose Feliciano After He Erroneously Identified Petitioner's Photograph on Redirect at Trial.

1. Jose Feliciano, one of the prosecution's primary eyewitness, was in the park shortly before the murders and was able to see both suspects closely for a lengthy period of time. Feliciano claimed he had also seen the suspect earlier in the week at the pond. (Exhibit S-A, Bell Gardens Police Report by Det. Bowers, dated 9/13/76).

2. In the first photo line up on 7/21/76, Jose Feliciano identified two photos out of the fourteen he was shown: Charles Michael Lohman and John Helder Arnett Jr. (Exhibit S-A, Bell Gardens Police Report by Det. Rogers, dated 7/21/76). One week later, Feliciano was shown six more color photos and chose Craig Crowder. (Exhibit S-A, Bell Gardens Police Report by Det. Pratt, dated 7/28/76). Officers re-interviewed Jose after another week passed. This time Jose Feliciano identified Eddie Avon Ledlow as one of the suspects and suggested that the men could have been brothers, implying that the second suspect was another of the Ledlow brothers. (Exhibit S-A, Bell Gardens Police Report by Dep. Figueroa, dated 8/3/76). Within one month of the crime, Jose Feliciano had identified at least four different men as one of the two men who he saw that night. None of the men identified were petitioner.

3. At trial, Feliciano identified a photograph of petitioner during redirect as one of the suspects he remembered seeing eleven years earlier as a young child. Trial counsel rendered ineffective assistance of counsel by failing to impeach the identification, which was damaging and prejudicial to petitioner's case. Feliciano claimed that he had identified the particular photograph in 1976. That particular photo, however, had not even been taken yet at the time he claimed to have identified it in 1976. (RT 2807).

4. During the redirect examination at trial, Deputy District Attorney Millett asked Feliciano if he could identify a photograph of petitioner, marked as People's Exhibit Six. Feliciano responded that he could. Millett asked which suspect he resembled. Feliciano said the man in the green jacket. Millett prompted, "and the motorcycle?" Feliciano answered "uh-huh." (RT 2328). On recross, trial counsel asked if Feliciano had been taken to South Gate in 1978 and had selected a photograph out of the eight he was shown. Trial counsel also asked if the name Craig Crowder meant anything to Feliciano. He said that it did not. This was the extent of trial counsel's attempt to impeach the identification which was ineffective. (RT 2329).

5. In closing arguments, DDA Millett raised the in-court identification, and reminded the jury that Feliciano testified that he recognized Memro as one of the two suspects. Millett also noted that Feliciano was the only witness who was physically near the suspects. There was no evidence that petitioner's photograph was ever included in a photo line up in the investigation of the 1976 murders, nor evidence that it was not. The photographs that were selected by witnesses were preserved by the Bell Gardens Police Department but not the other photos from the line-ups. Out of the five people Feliciano selected as the two suspects, petitioner was not among them.

6. Trial counsel had the photographs Feliciano had actually identified in 1976, yet did not use any of them to impeach Feliciano after he erroneously identified a photograph of petitioner as the one he had selected years before. In closing, trial counsel merely noted that the photograph identified as the photograph selected in 1976 was not taken until 1978. The fact that the photo was not taken until 1978, without further explanation, did not significantly impeach Feliciano. While it showed that the particular picture was not identified, it did not show that Feliciano did not identify a similar photo of petitioner taken earlier. The jury was left with the impression that Feliciano had identified a similar photo of petitioner in 1976.

7. Counsel also did nothing to cast doubt on the veracity of the identification of the man depicted in the photograph. Counsel should have noted to the jury that the crime had happened 11 years before and that Feliciano was a child at the time. Counsel also should have noted the fact that Feliciano had selected photographs of five men who were supposed to be one of two suspects within one month of the crime and that petitioner was not among them. Feliciano was not a reliable witness and indicia of his unreliability should have been presented to the jury.

8. At trial, Feliciano contradicted many of the police report interviews he himself had given in 1978. Considering the prejudicial value of Feliciano's questionable

identification, trial counsel was obligated to impeach Feliciano with these inconsistent statements. Despite the fact that Bell Gardens police officers repeatedly went to Feliciano with photos for him to identify in the month following the crime in 1976, Feliciano testified that he was never shown photographs by the Bell Gardens police officers:

Q: Do you recall Bell Gardens showing you pictures?

A: No.

Q: Did you ever identify the guy on the motorcycle?

A: In Bell Gardens, No.

Q: Do you recall?

A: Not until I identified someone in South Gate"

(RT 2319).

9. In fact, shortly after the crime Feliciano identified a man named John Arnett Jr., as the man on the motorcycle when shown photographs by Bell Gardens police officers. (Exhibit S-A, Bell Gardens Police Report by Det. Rogers, dated 7/21/76). Feliciano even contradicted himself in his brief testimony. Holding up the photo of petitioner that Feliciano had thought he identified previously, trial counsel asked again if he recognized the photograph:

Q: This picture that was shown to you, have you ever seen this before?

A: I believe so.

Q: When?

A: I think this Bell Gardens.[Sic]

(RT 2331). This statement was made only a short time after Feliciano denied identifying any photographs in Bell Gardens.

10. Feliciano could not remember which of the men wore the green jacket and which drove the motorcycle. Though Feliciano always said that he saw two suspects together, he sometimes claimed that the one on foot was in the green jacket, he sometimes

claimed that the man on the motorcycle was the one wearing the green jacket. In 1976, Feliciano told Detective Gossett that the man on foot was wearing the green jacket, not the man on the motorcycle. (Exhibit S-A, Bell Gardens Police Report by Det. Gossett, dated 7/26/76). Then at trial, Feliciano testified that the man on the motorcycle was wearing the green jacket and the man on foot was not wearing any jacket at all. (RT 2320, 2321). Feliciano had told Bell Gardens officers during the investigation immediately after the crime that the gas tank on the motorcycle that Suspect Two was riding was green. (Bell Gardens Police Report by Det. Gossett, dated 7/26/76). At trial Feliciano denied stating that the gas tank was green. (RT 2321). Even after trial counsel read back an excerpt from a police report where Feliciano described the motorcycle as yellow with a green gas tank, Feliciano still maintained that he did not say the gas tank was green: "I don't think nothing about no green gas tank though." (RT 2324, 2325).

11. None of this evidence was used to effectively impeach Feliciano on recross after he identified the petitioner on the stand at trial. Not only did trial counsel not impeach Feliciano's most recent identification, but he brought that identification to the jury's attention six times. (RT 2329-2333). His failure to bring Feliciano's prior identifications to light was grossly ineffective, since in California, prior inconsistent statements are admissible for their truth.

12. Therefore, trial counsel could have introduced the prior identifications not just to impeach but to demonstrate that the killer was one of the four other people Feliciano identified. Trial counsel rendered constitutionally ineffective assistance of counsel.

CLAIM 105: Trial Counsel Rendered Ineffective Assistance by Failing to Argue Effectively to the Jury During the Guilt Phase the Applicability of the Second Degree Murder Maximum on Count One.

1. In a capital trial, a deficient closing argument can constitute ineffective assistance of counsel. *Hall v. Washington*, 106 F.3d 742 (1997). In evaluating an

ineffective assistance of counsel claim based on an attorney's summation, a court is required to assess the effectiveness of the summation as a whole. *United States v. Salameh*, 54 F. Supp. 2d 236, 255 (S.D.N.Y. 1999); *aff'd*, 16 Fed. Appx. 73 (2nd Cir. 2001). A closing argument is deficient where the theory of the case and the method of implementing the theory of the case were unreasonable under the circumstances. *United States v. Ciancaglini*, 945 F. Supp. 813, 825 (E.D. Pa. 1996).

2. Trial counsel filed a motion asking that the jury be instructed that the maximum degree for Count 1 could only be murder in the second degree, based on the 1979 trial court's verdict. The prosecutor opposed that motion. (RT 2224). Ultimately, the judge denied petitioner's request and gave CALJIC 8.75, instructing:

> Count 1 charged murder in the second degree as a matter of law. This is for reasons which do not concern your deliberations and about which you must not speculate.

(RT 2766). This instruction left the erroneous impression that Count 1 may have been limited to second-degree murder because of some legal technicality, and not because of a prior factual determination. The instruction not to consider this matter prevented the jury from recognizing the factual basis for the second degree finding.

3. The instruction given was not the instruction requested by trial counsel. At no point, however, did the trial court order trial counsel not to argue the theory before the jury. Moreover, during the hearing on the motion, Count 3 was not discussed. Therefore, there was no ruling, express or implied, that trial counsel could not argue the similarity between the facts of Count 1 and the facts of Count 3 in order to avoid a true finding of the special circumstance. Trial counsel was never precluded from mentioning the fact that Count 1 was at most second- degree murder, or drawing an analogy between that count and the others.

4. Trial counsel failed to follow up on the instruction given and provide forceful argument for the jury as to how that instruction should be applied. Counsel was ineffective

by failing to argue for a more precise and advantageous instruction specifying the reason the maximum charge was second degree. After fighting for the instruction that he wanted and receiving a partial instruction on the issue, trial counsel failed to use it in any way whatsoever.

5. During trial counsel's closing arguments, there were several points where it would have been appropriate to mention the second degree murder instruction and tie that in to the other two murders.

a. Trial counsel began his argument by addressing Count 3. Trial counsel once again conceded guilt over petitioner's specific objection and argued that the murder was second-degree only. Speaking hypothetically about the guilt phase, trial counsel explained: "If that's subject to two reasonable interpretations, and it is, that you have to accept the one that would point to him not being guilty of the charge. Now, that would apply to the degree, too, if you look at a first or a second degree murder." (RT 2798). With no strategic purpose, trial counsel failed to explain why Count 1 was at most second-degree, and how that finding affected the other counts.

b. Trial counsel explained: "When the boy asked to go home, he snapped." (RT 2799). Trial counsel should have noted that these facts were very similar to the facts alleged in Count 1. Since Count 1 was at most second-degree, it stood to reason that Count 3 was also at most second-degree. There was no tactical reason not to raise this argument.

c. Trial counsel discussed the first two counts and the evidence stemming from the purported confession. (RT 2824). According to the confession, Scott Fowler was killed first. The noise allegedly woke up Ralph Chavez who was killed shortly thereafter. Trial counsel should have mentioned the second-degree limitation in the Fowler killing and applied that finding to the Chavez

killing.

6. Trial counsel's failure to make these arguments was constitutionally ineffective. He failed to present a viable theory, a theory which he himself had discussed with the trial court and the prosecutor. This theory was clearly available and there was no strategic reason not to argue it. *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993); *Eldridge v. Atkins*, 665 F.2d 228, 232 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982) ("'it is the duty of the lawyer to ... explore all avenues leading to facts relevant to ... degree of guilt.'"); *see also Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994).

7. Because the issue of whether a killing was impulsive or premeditated can be "an important factor when the jurors consider whether to recommend the death penalty," an attorney can be ineffective for failing to raise a reasonable doubt as to the impulsiveness or premeditation of the act during opening and closing arguments. (*Magill v. Dugger*, 824 F.2d 879, 889 (11th Cir. 1987)). Here, the lack of premeditation in regard to Count 3 would have rendered petitioner ineligible for death.

8. If the jury returned a verdict of second degree murder on Count 3, which did not carry a potential death sentence, then petitioner's sentence would necessarily be no greater than life in prison. Petitioner was prejudiced in the penalty phase as well as the guilt phase from this constitutional violation, since lingering doubts as to whether the murder was premeditated is an important factor that the jurors consider in determining whether to return a death penalty verdict. *King v. Strickland*, 748 F.2d 1462, 1464 (11th Cir. 1984) (lingering doubt as to guilt or innocence), *cert. denied*, 471 U.S. 1016 (1985).

9. For failing to request a more specific jury instruction and for failing to use the instruction that was given to his client's advantage, trial counsel rendered ineffective assistance of counsel. By identifying a particular line of argument that might have changed the outcome of this case, petitioner has demonstrated that counsel's closing argument amounted to ineffective assistance of counsel. *Proctor v. Butler*, 831 F.2d 1251, 1256

(5th Cir. 1987).

CLAIM 106: Trial Counsel Rendered Ineffective Assistance by Failing to Inform the Jury That the Word 'Both' in CALJIC 8.75 Should Be Understood as 'Either Or'.

1. Trial counsel objected to the wording of CALJIC 8.75. The court instructed: "If you unanimously agree that the defendant is guilty of said offense charged in *both* counts 2 and 3 . . ." Trial counsel requested that the word "both" be replaced with "either or." (RT 2768). The judge overruled the objection and told trial counsel, "You can cover it in your argument, and I think that I would hope that both counsel are going to address the jury verdicts and how to go through them." (RT 2722).

2. Trial counsel did not address the jury verdict forms at all. Counsel failed to explain to the jury that they were to make a determination on each count independently, regardless of how the instructions appeared. After arguing that the word 'both' should be replaced with 'either or' and then being advised by the court to raise the issue with the jury in arguments, it was incumbent on trial counsel to do so. Failure to do so was deficient advocacy and prejudiced defendant.

3. Count 3 was the only death-eligible count. Count 1 was at most second-degree murder. Counsel had asked the court to so instruct the jury. Counsel was thus aware of the distinction in degree and was presumably aware of the importance of that distinction. Since counsel conceded that petitioner had killed the victim in Count 3, it was incumbent on counsel to undo any linkage between Count 3 and Count 2, which was more supportive of a first- degree verdict under the witness theory that the victim was allegedly killed to eliminate a witness. Counsel could thus seek to link Count 3 to Count 1, which was second-degree as a matter of law. This link would have avoided a first-degree murder verdict and a true finding of the special circumstance.

4. Having conceded guilt of the underlying offense in Count 3, there was no tactical reason not to seek a guilty verdict of a lesser included offense.

5. Counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. (*See Powell v. Alabama*, 287 U.S. at 68-69). The adversarial process protected by the Sixth Amendment requires that counsel act in the role of advocate, subjecting the prosecution's case to meaningful adversarial testing. (*See, e.g., United States v. Cronic*, 466 U.S. 648, 656-57, 661-66 (1984); *United States v. Swanson,* 943 F.2d at 1072-75; *Osborn v. Shillinger,* 861 F.2d at 625-30)). If the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated and prejudice is presumed. (*See Cronic,* 466 U.S. at 658-60; *Swanson,* 943 F.2d at 1074; *Osborn*, 861 F.2d at 625).

6. In failing to effectively advocate on behalf of petitioner by alerting the jury to the misleading instruction, as the trial judge suggested, trial counsel rendered ineffective assistance of counsel.

6. PENALTY PHASE ISSUES.

CLAIM 107: Petitioner was Denied his Right to the Assistance as a Result of Trial Counsel's Failure to Investigate and Present Mental Defenses.

1. Prior to the first trial, counsel requested an evaluation of the mental status of petitioner, including neuropsychological testing. Petitioner had previously been an inmate at Atascadero State Hospital, having been sent there in 1972. Trial counsel obtained his file from Atascadero. That file reflected that petitioner was administered an electroencephalogram (EEG) in 1972. The results of that test indicated abnormal results, particularly over the temporal-occipital areas of the brain.

2. Despite possession of these reports, including evidence that petitioner had amnesia about an incident where he allegedly assaulted a nine-year-old boy with a coke bottle, trial counsel failed to obtain a full psychological evaluation, including neuropsychological testing.

3. Trial counsel did not provide the reports from Atascadero to the mental

health expert who consulted trial counsel. The absence of this information led the mental health expert erroneously and prejudicially to believe that the results of any brain examination were normal.

4. There was no tactical reason not to have such a neuropsychological evaluation conducted as part of the preparation of this case in light of the mental background of petitioner.

5. Trial counsel did not obtain or present evidence of the environmental factors that damaged petitioner's mental development and functioning throughout his life. Readily available family and other witnesses would have provided detailed information of the physical and mental abuse petitioner suffered as a child, including the physical and mental attacks at the hands of his abusive alcoholic father. The family members would also have provided information regarding petitioner's exposure to lead and other heavy metals.

6. The conduct of a complete psychiatric evaluation would have led to a more favorable result in the guilt and penalty phases of the trial. Evidence of petitioner's mental condition was admissible on the degree of murder in the guilt phase of the trial. The defense at the first trial had presented a diminished capacity defense which was supported by some medical reports. Trial counsel at the second trial did not investigate or present this or additional available evidence to support a diminished capacity defense, despite being in possession of the prior reports.

7. The evidence reasonably available to petitioner's trial counsel at both trials would have negated the *mens rea* elements of the murder charges and special circumstance allegations alleged against petitioner. Said evidence included, but was not limited to, evidence of petitioner's history of multiple head traumas, which were intentionally inflicted by his physically abusive parents and suffered during childhood and adolescent accidents; organic brain damage localized in the area of the temporal and occipital lobes; petitioner's history of severe abuse and victimization as a child, in a dysfunctional family headed by

violent, abusive and emotionally unstable parents, that produced life-long psychic trauma; a documented clinical history dating from petitioner's early adolescence reflecting professional observation of psychiatric symptoms including auditory hallucinations, delusional thought processes, anxiety, paranoia, severe somatic physical sensations, decompensation, schizophrenia, psychosis and disassociation warranting intervention and treatment; and a history of life-long conditioning and proneness to false confessions.

8. Investigation of this evidence, its consideration by mental health professionals and presentation to the fact-finder would have supported mental state defenses based on petitioner's myriad of mental, neurological and emotional impairments that substantially affected petitioner's judgment, intellectual functioning, ability to understand or appreciate the nature and consequences of his actions and the ability to monitor, assess or control his behavior.

9. Said evidence reduced petitioner's legal and moral culpability for the charged offenses and provided an independent basis on which an impartial sentencer would have concluded that life imprisonment without the possibility of parole was the appropriate sentence.

10. Trial counsel failed to submit the prosecution's case to meaningful adversarial testing resulting in a denial of petitioner's constitutional right to effective assistance of counsel. *See Strickland v. Washington*. Specifically, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* at 691; *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2536-2537 (2003) . Pretrial preparation is especially crucial in a capital case in light of the seriousness of the charges and potential penalty. *Magill v. Dugger,* 824 F.2d 879, 886 (11th Cir. 1987). Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how to best represent a client. *Sanders v. Rawtelle,* 21 F.3d 1446, 1456 (9th Cir. 1994).

11. Counsel had no tactical reason for not investigating and presenting the foregoing evidence at either of petitioner's trials. The failure to present such evidence deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

CLAIM 108: Petitioner's Rights to Due Process and Effective Assistance at Both Guilt and Penalty Phases, and to a Reliable Determination of Penalty, Were Violated as a Result of Failure to Investigate and Present Mitigating Penalty Phase Evidence.

1. Substantial mitigating evidence as to the circumstances of the offense and as to petitioner's character and background existed at the time of the trial and was readily available to defense counsel. Much of this evidence concerns petitioner's abusive childhood; studies have found that juries consistently find evidence of childhood abuse to be the single most compelling kind of evidence put on at the penalty phase. Counsel, however, did virtually nothing to investigate such evidence or prepare for the penalty phase. In addition, counsel failed to educate petitioner adequately as to the need for and importance of a penalty phase presentation.

2. Exhibits M-X, illustrative of the evidence readily available with reasonable investigation at the time of the offense, are incorporated herein by reference as if set forth in full.

3. Trial counsel failed to submit the prosecution's case to meaningful adversarial testing resulting in a denial of petitioner's constitutional right to effective assistance of counsel. *See Strickland v. Washington*. Specifically, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* at 691. Pretrial preparation is especially crucial in a capital case in light of the seriousness of the charges and potential penalty. *Magill v. Dugger,* 824 F.2d 879, 886 (11th Cir. 1987). Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how to best represent a client. *Sanders v. Rawtelle,* 21 F.3d 1446, 1456 (9th Cir. 1994); *see also Wiggins*, 123 S. Ct. at

2536-2537.

4. There is "a duty to seek out psychiatric evaluation of a client where the grounds of a mental defense are apparent." *Hendricks v. Calderon*, 64 F.3d 1340, 1373 (9th Cir. 1995). The failure to adequately investigate a defendant's mental condition when there is evidence of impairment constitutes deficient performance and is prejudicial when it hampers later presentation of evidence of mental impairment. *Evans v. Lewis,* 855 F.2d 631, 637 (9th Cir. 1988). Reasonable professional standards require that counsel use a psychiatrist to put a defendant's mental condition in proper focus. *Loyd v. Whitley,* 977 F.2d 149, 158 (5th Cir. 1992).

5. Here, despite a hospitalization at Atascadero State Hospital for three years and a sad abundance of other mitigating evidence, trial counsel only put on one lay witness to testify regarding petitioner's life history in an effort to show the difficult circumstances petitioner endured. At a rudimentary minimum, counsel needed to present a qualified mental health expert to explain to the jury how the psychological trauma affected petitioner and explained his conduct. The failure to present a mental health expert when the sole defense relates to mental state is not a reasonable decision. *Deutscher v. Whitley,* 884 F.2d 1152 (9th Cir. 1989). "[T]he Sixth Amendment requires an attorney to look for evidence that corroborates the defense he pursues." *Hendricks v. Calderon,* 64 F.3d at 1352. And, here, where significant evidence corroborating the sole defense and mitigation is available, it must be presented to the jury. *United States v. Tucker,* 716 F.2d 576, 594 (9th Cir. 1983). The failure to present this significant evidence constituted ineffective assistance of counsel. *Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994) (depriving accused of most critical evidence supporting his defense to murder charge constitutes ineffective representation); *Deutscher v. Whitley,* 884 F.2d at 1161-1162.

6. Psychiatric mitigating evidence is necessary because it can explain the causal relationship that can exist between mental illness and homicidal behavior. It also

significantly weakens the aggravating factors. *See Elledge v. Dugger*, 823 F.2d 1439, 1445-47 (11th Cir.), *modified in part*, 833 F.2d 250 (11th Cir. 1987) (withdrawing unrelated portion of the opinion). Psychiatric assistance at the penalty phase enhances the jury's ability to determine with full information whether death is the appropriate penalty. Without the benefit of such psychiatric opinion there is "a much greater likelihood of an erroneous decision." *Ford v. Wainwright,* 477 U.S. 399, 414 (1986) (plurality opinion).

7. Petitioner's jury lacked the necessary information to reach an informed decision.

8. As with the right to counsel, a Sixth Amendment federal right is relevant to the Court's construction of "due process of law" in the Fourteenth Amendment. The Sixth Amendment guarantees an accused the right "to have compulsory process for obtaining witnesses in his favor."

9. These constitutional guarantees are meant to assure a defendant "fundamental fairness" as *Ake v. Oklahoma* puts it and to prevent the trial from being a charade. Further, these rights are meant to preserve the constitutional meaning of a trial as a forum in which witnesses confront the accused and the accused confront the witnesses and, moreover, has witnesses in his favor. Thus, the obligation has been put upon each state to give effective psychiatric assistance to the accused. *See Harris v. Vasquez*, 949 F.2d 1497, 1530 (9th Cir.) (Noonan, J., concurring in part).

10. The failure to call other available social history witnesses to testify was additionally constitutionally ineffective assistance. By calling only a single witness, the jury was left with the impression that the penalty phase case was highly dubious and insubstantial. *See Hendricks v. Calderon*, 64 F.3d at 1352 (lack of corroborating evidence regarding petitioner's past may have left the jury with the impression that his unfortunate history was all a fabrication to provide a defense). Calling a single witness whose testimony tended to minimize the harsh nature of petitioner's upbringing was

improper and gave the jury a false impression. Any presumption that trial counsel acted competently gives way when the act or omission provides "no advantage" to the defense as here. *Proffitt v. Waldron*, 831 F.2d at 1249.

11. As a result of the above, petitioner was denied effective assistance of counsel at the penalty phase of his case.

CLAIM 109: Trial Counsel Rendered Ineffective Assistance for Failing to Present Mitigating Evidence in the Sentencing Phase of Trial.

1. Without tactical reason, trial counsel failed to introduce available mitigating evidence at the penalty phase. The only witnesses presented in the penalty phase were petitioner's sister and petitioner himself. Petitioner's sister offered some basic testimony about his social history. (RT 2942). Petitioner was permitted to take the stand only to read a statement clarifying that if they truly believed he committed these crimes, a conclusion with which he disagreed, then death was appropriate. (RT 2969).

2. This Court summarized it as follows:

> Over defendant's objection, the defense summoned one witness: Kathy Klabunde, his sister. She testified that their father, an alcoholic, verbally abused the children. Defendant, the eldest, would care for the others. He had migraine headaches "on and off for years." His headaches would cause him to "get very angry easily. I remember a period where he stayed downstairs for a couple of days where it was dark and cool to stay out of the light because his head hurt."
>
> As stated, defendant sought to bar his sister's testimony--he objected to a specific question at one point and called her a liar from his chair at another. After the jury retired, he asked to reopen the case so that he could testify, and the court acceded to his request. He stated to the jury, "I just have a short statement I'd like to read to the jury. [P] While I do not concede the truth, accuracy or correctness of the jury's verdicts, I do feel that since the jury has returned the verdicts of guilt in the maximum degree possible on all counts and the special circumstance, that they should also now return with a verdict of death as the appropriate penalty. Thank you."
>
> At closing argument, counsel emphasized defendant's mental problems, his cooperation with the police, lingering doubt regarding the special circumstance in light of his alibi defense to the killings of Fowler and Chavez, the grimness of life imprisonment, his lack of a prior felony conviction, the likelihood that he would not be dangerous in prison, and positive aspects of his background and character, including his remorse when he was discovered.

Memro II, 11 Cal.4th at 816-817.

3. The failure to investigate and present available mitigating evidence during the sentencing phase undermined the adversarial process and petitioner's death sentence is unreliable. *Austin v. Bell*, 126 F.3d 843 (1997). "[T]he Eighth Amendment requires a jury to consider the circumstances of the crime and the defendant's background and character during the sentencing phase of a capital trial." *Id; see also Boyde v. California* 494 U.S. 370 at 377-78; *Lockett v. Ohio*, 438 U.S. 586 (1978).

4. Claims of ineffective assistance of counsel at the penalty phase are governed by the *Strickland* standard. *Williams v. Taylor,* 529 U.S. 362, 396 (2000); *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001).

5. In *Strickland v. Washington,* 466 U.S. 668, 690 (1984) as recently affirmed by *Williams* and *Wiggins*, the Supreme Court established that the benchmark for determining whether counsel was ineffective was whether petitioner showed (1) that counsel's performance was deficient and (2) that petitioner was prejudiced by the deficiency. When the failure to present evidence is not due to a tactical decision, reversal is warranted.

6. Effective counsel must not only present available mitigating evidence, but also explain its significance. *Williams v. Taylor* 529 U.S. 362 (2000); *Mayfield v. Woodford* 270 F.3d 915 (9th Cir. 2001); *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2001).

7. Some eleven witnesses and much mitigating evidence was available and not presented to the jury. Each witness was available to testify at trial but was not contacted by trial counsel:

8. Mary Memro, petitioner's aunt, would have testified to the cruelty Earl, petitioner's father, inflicted on his family, as well as Alvina's cold relationship with her children. Exhibit S.

9. Floyd Ziolkowski , petitioner's maternal uncle, was prepared to testify to petitioner's dysfunctional extended family and Earl's extreme alcohol addiction. Exhibit T.

10. Pam (Memro) Davis, petitioner's cousin, was prepared to testify to the savage beatings Earl used to give to his dogs, many of which had to be put to sleep because they had become vicious. Exhibit W.

11. Donald Memro, petitioner's younger brother, was prepared to testify to the beatings Earl used to inflict on his children. Earl beat all of his children but he beat petitioner most severely. Exhibit X. Earl used to make petitioner fight him in view of the rest of the family. The children were routinely pummeled into submission. Exhibit X at 13. Donald was also prepared to testify that he witnessed petitioner fall 15-18 feet from a tree, hit his head on a rock and lose consciousness, at the age of 12. Petitioner's parents refused to seek medical treatment for the injury and petitioner's frequent and severe migraine headaches began after that point. Exhibit X.

12. Dr. Gretchen White documented that after petitioner's head injury, petitioner underwent behavioral changes. Dr. White opined that Mr. Reno's loss of self control throughout his life was reasonably attributable to the head injury resulting from the fall. In 1964, Mr. Reno received another head injury in a motorcycle accident. He developed extreme migraine headaches, which continued throughout his life, sometimes confining him to the darkness of the basement for extended periods of time. Exhibit AA at 12, 23.

13. Jack Brunette, petitioner's cousin was prepared to testify to the cruelty he witnessed Earl inflict on his wife in front of the young children. Earl would berate, taunt and "prey on her fears." Exhibit Y. Earl would psychologically terrorize petitioner's mother in front of the children, who as toddlers, would be subjected to her screams of terror. Exhibit X at 8.

14. Nancy Brunette, Jack Brunette's wife, was prepared to testify that she could remember "wondering if Earl and Alvina loved their children." Exhibit Z.

15. Marjorie Hoisington, a family friend, was prepared to testify about the severe abuse perpetrated by Earl Memro on his family.

16. Other mitigating evidence could have been introduced as well.

17. At the age of nine, petitioner was molested by a teacher, and then a priest. In a desperate time, petitioner was forced to sell sexual favors for food. Exhibit AA at 12.

18. The Memro children were not allowed to bring friends over.

19. The family was socially isolated.

20. Petitioner lacked any adequate parental or familial role models. Consequently, Mr. Reno his behavior in his own dysfunctional surroundings. Exhibit X at 10.

21. As an escape mechanism, Mr. Reno began using drugs in his teens. Exhibit X at 14.

22. In 1972, at age 27, petitioner was confined to Atascadero State Hospital for an indefinite period of time after assaulting a young acquaintance. At Atascadero, he was diagnosed as having a sexual deviation, homosexuality (See Diagnostic and Statistical Manual, Second Edition [DSM II], Sexual Deviations 302.0).[14] Mr. Reno underwent treatment and rehabilitation for his sexual orientation, which was seen as abnormal. When he was released three years later, the state determined that he did not pose a harm to others.

23. He later sought readmission to Atascadero, which was denied. He tried to control his sexual impulses, but without professional help he relapsed. Exhibit X at 23.

24. Additionally, the testimony of petitioner's youngest sister, Kathy Klabunde, did not give the jury an adequate picture of petitioner's life. She was the youngest of the siblings. She was too young to remember the violent clashes petitioner and his brothers had with their father Earl. (RT 2956). Also troubling was that her testimony that her father

---

[14] When the DSM III was published in 1980, this "disorder" was removed from the text

was a "good man" who was not physically abusive was contrary to all the known evidence, which was not presented. (RT 2945). Effective counsel would have presented testimony demonstrating the true nature of Mr. Reno's social history. See Exhibits R-Z.

25. In *Wiggins*, the Supreme Court held that trial counsel had rendered ineffective assistance of counsel because counsel failed to investigate and present mitigating information to the jury though he was aware that such information existed. *Wiggins*, 123 S.Ct. 2527. In that capital case, trial counsel's investigation consisted of, in part, the review of the Pre-Sentence Investigation report and Department of Social Services records and hiring a psychologist who tested petitioner. *Wiggins*, 123 S.Ct. at 2536. This investigation revealed that "petitioner had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder;" that petitioner had "spent most of his life in foster care;" and that petitioner's personal history included "misery as a youth" and a "disgusting" background. *Id.*

26. While noting that "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation," the Supreme Court noted that counsel's "decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards" and the "scope of their investigation was also unreasonable in light of what counsel actually discovered in the DSS records." *Wiggins*, 123 S.Ct. at 2537. Because the records that trial counsel possessed indicated that Wiggins' "mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food," the Court held that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Id.*

27. In analyzing the prejudice caused by trial counsel's ineffectiveness, the Supreme Court noted that "counsel were not in a position to make a reasonable strategic choice as to whether to focus on Wiggins' direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable" and that there was a reasonable probability that the jury would have returned a different sentence had it been presented with the evidence. *Wiggins*, 127 S. Ct. at 2543.

28. In *Mayfield v. Woodford* 270 F.3d 915 (9th Cir. 2001), a capital conviction was overturned where trial counsel only introduced one witness at the penalty phase. The court held that:

> if the jury had considered the testimony of experts . . . or of friends and family members relating additional humanizing stories, there is a 'reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed' [*Strickland*] 466 U.S. at 700. Accordingly, we conclude that Mayfield was prejudiced by Ames' deficient performance at the penalty phase.

Id.

Petitioner's jury lacked such humanizing stories, either portraying petitioner in a more human light, or explaining to the jury the horrendous childhood petitioner was forced to endure, which greatly affected his development.

29. In *Ainsworth v. Woodford*, 268 F.3d 868 (2001), the Ninth Circuit Court of Appeals reversed a death sentence where trial counsel introduced four witnesses in the penalty phase, because the jurors "saw only glimmers of [the defendant's] history, and received no evidence about its significance vis-a-vis mitigating circumstances" citing *Wallace v. Stewart* 184 F.3d 1112, 1117 (9th Cir. 1999). Petitioner's jury received less than a glimmer through a single witness who tended to minimize the damaging circumstances.

30. Trial counsel presented a single witness, despite the wealth of available witnesses who could provide powerful mitigating evidence. "Given the severity of the

potential sentence and the reality that the life of [petitioner] was at stake," trial counsel had a duty to collect as much information as possible about the defendant for use at trial. *Hill v. Lockhart,* 28 F.3d at 845 (*quoting Pickens v. Lockhart,* 714 F.2d at 1467). "[I]t is only *after* a full investigation of *all* the mitigating circumstances that counsel can make an informed, tactical decision about which information would be most helpful to the client's case." *Pickens.* [emphasis in original].

31. The duty to present a complete and coherent defense at the penalty stage is especially pronounced. *Jackson v. Herring,* 42 F.3d at 1369 ("In cases where sentencing counsel did not conduct enough investigation to formulate an accurate life profile of a defendant, we have held the representation beneath professionally competent standards"). "[T]he Sixth Amendment requires an attorney to look for evidence that corroborates the defense he pursues." *Hendricks v. Calderon,* 64 F.3d at 1352. Where significant evidence corroborating a defense is available, it must be presented to the jury. *United States v. Tucker,* 716 F.2d at 594.

32. Trial counsel presented bits and pieces of petitioner's background but fell far short of presenting the "accurate life profile" of petitioner which would have provided compelling mitigating evidence which would have resulted in a life verdict. *Jackson v. Herring*, 42 F.3d at 1369. A competent and coherent defense which fully developed the available and abundant mitigating factors would have affected the outcome of the penalty phase of petitioner's trial, and the failure to present one was ineffective. *See Hendricks v. Calderon,* 64 F.3d at 1352. Counsel's performance was constitutionally ineffective, as he had considerable mitigating evidence available which he failed to introduce.

33. In order to determine whether the deficient performance was prejudicial, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Reasonable probability is defined as that which is "sufficient to undermine

confidence in the outcome." *Strickland.* Another formulation of the prejudice test in capital cases is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Williams.*

34. The failure to present mitigating factors in itself can constitute prejudice. In *Lambright v. Stewart*, 241 F.3d 1201 (2001) trial counsel introduced only one mitigating witness. The court held that this failure prejudiced defendant. "We have previously found that the prejudice requirement is met where 'defense counsel effectively presented no mitigating evidence at sentencing, despite the presence of aggravating factors'" citing *Smith v. Stewart* 189 F.3d 1004, 1013 (9th Cir. 1999).

35. Trial counsel's failure to present available mitigating evidence constituted ineffective assistance of counsel. The sentencing phase of petitioner's sentence should be reversed. Had trial counsel introduced the full body of available social history and psychiatric evidence, it is reasonably likely a more favorable verdict would have been obtained.

CLAIM 110: Trial Counsel Rendered Ineffective Assistance in Failing to Argue Lingering Doubt.

1. Trial counsel requested that a lingering doubt jury instruction be given. (RT 2941). The requested instruction informed the jury that they could consider any lingering doubts about petitioner's guilt in considering the appropriate penalty. The trial court denied the proposed instruction. (Id.).

2. In the penalty phase, trial counsel introduced only one lay witness to offer social history or psychiatric evidence. Petitioner was the second and final defense witness to testify. He testified that if the jury believed he was guilty of the offenses, the appropriate penalty was death. Nonetheless, he maintained his innocence. (RT 2969). The effect of his testimony was to rely solely on the concept of lingering doubt.

3. It was error not to instruct the jury on the concept of lingering doubt. The

refusal to give a lingering doubt instruction was error and deprived petitioner of his constitutional rights.

4. Under the Sixth Amendment, the Eighth Amendment and the Due Process Clause, petitioner was entitled to present evidence at the penalty phase. *Lockett v. Ohio,* 438 US 586 (1978); *Skipper v. South Carolina,* 476 US 4 (1986). A defendant's right to present penalty phase evidence is critical in order to allow the jury to come to a reasoned decision as to the appropriate sentence, and avoid an arbitrary and capricious verdict. *Gregg v. Georgia,* 428 US 153,189-190 (1976). The penalty phase defense centered largely on the concept of lingering doubt and was supported by petitioner's testimony.

5. Trial counsel rendered ineffective assistance of counsel by failing to effectively argue lingering doubt in his closing argument. Trial counsel made but a brief mention of the concept without providing any persuasive basis for applying it. In full, counsel argued:

> There's also some things - - another thing to consider as a factor in mitigation. There's what's called lingering doubt or a residual doubt. A lingering doubt would be as to the special circumstance, and it is a factor for you to consider in determining whether or not you want to impose the death penalty. Lingering doubt would have to do with it's more than beyond a reasonable doubt. It might be somewhere less than a hundred percent certain.

(RT 2985).

According to this Court and the Supreme Court, trial counsel is always permitted to argue lingering doubt, even if the instruction is refused. However, here, counsel's brief description of lingering doubt could do nothing but confuse the jury.

6. In *People v. Sanchez* 12 Cal. 4th 1 (1995), this Court held that there was no requirement to instruct the jury on lingering doubt since through both jury instructions and defense counsel's closing arguments, the jury was informed that it may consider lingering doubts as mitigating evidence. In closing arguments, defense counsel for Sanchez "asked the jury whether it had 'some lingering doubts about what [it] would have seen' if it had

been" at the scene of the crime. *Id.* at 78. This Court held that this statement coupled with the properly given general jury instruction on mitigating evidence was broad enough to include all factors, even lingering doubt.

7. In *People v. Lawley*, 27 Cal.4th 102 (2002), this Court clarified *Sanchez* and stated that even if defense counsel does not inform the jury that they may consider lingering doubt as mitigating evidence, it is still not error for the court to refuse a lingering doubt instruction. Again this Court noted that if trial counsel wished to introduce the concept of lingering doubt to the jury, trial counsel should include it in argument. The court wrote that "defendant, having sought the instruction, was well aware of the concept of lingering doubt and could have argued it had he believed it beneficial to himself." *Lawley,* at 127.

8. As mentioned above, under *Skipper*, *Lockett* and *Eddings*, plaintiff has a Constitutional right under the Sixth Amendment, Eighth Amendment and the Due Process Clause to present all mitigating evidence. Since petitioner has a right to present it, *a fortiori* he has a right to argue it to the jury. There was no strategic reason not to give the jury a framework for considering the evidence and stress its importance. The failure to inform the jury about lingering doubt violated plaintiff's constitutional rights, as discussed in *Strickland* and its progeny.

9. To the extent jury instructions were not required, it was incumbent on counsel to argue lingering doubt in his closing argument. Failure to do so sabotaged trial counsel's own penalty phase strategy. By failing to inform the jury that it is appropriate to include any residual doubt from the guilt phase in consideration of the penalty after being refused the jury instruction, trial counsel rendered ineffective assistance of counsel.

CLAIM 111: Petitioner was Denied Effective Assistance with Respect to David Schroeder's Testimony.

1. Trial counsel unreasonably failed to prepare for the possibility that David

Schroeder's testimony would be presented and unreasonably failed to investigate and present evidence as to inconsistencies in his testimony. See also Claim 81. As a result, trial counsel was caught flat-footed when the prosecutor presented, and effectively argued, the evidence regarding the assault on Schroeder.

2. As a result of the above, petitioner's penalty phase trial and sentence to death were fundamentally unfair and violated his Sixth, Eighth and Fourteenth Amendment rights.

H. CLAIMS RELATING TO JURY ISSUES.

CLAIM 112: Petitioner was Denied an Impartial Jury Drawn from a Fair Cross-Section of the Community.

1. The offenses with which petitioner was charged in this case occurred in South Gate and Bell Gardens, Los Angeles County, California. South Gate and Bell Gardens are within the Los Angeles County Southeast Judicial District and the courthouse for this district is in Norwalk, California. Accordingly, the case was assigned to that courthouse.

2. Petitioner moved to quash the Norwalk Superior Court jury venire on the ground that it did not represent a fair cross-section of the community and instead systematically excluded minority jurors.

3. By stipulation, the record was adopted of a similar motion being litigated in the case of *People v. Mattson*, 50 Cal.3d 826 (1990). That record establishes that minorities were at the time of petitioner's trial systematically excluded from the jury venire through a selection system in which most minority jurors who would have otherwise served in Norwalk were sent to the downtown courthouse, outside the judicial district, to serve. The county jury commissioner agreed that this was true. As a result, although over 50% of the population of the area from which jurors were drawn was African-American or Hispanic, under 20% of the people on the jury venire were African-American or Hispanic. Although there are judicial districts in Los Angeles County the boundaries of which

determine where offenses will be tried, jurors are not drawn specifically from within judicial districts and there are no fixed boundaries to the areas from which jurors are drawn to serve in particular courthouses.

4. Petitioner demonstrated to the Superior Court that there were enormous disparities between the percentages of Hispanics and African-Americans within a community consisting of the area from which the jurors were actually chosen (a 20-mile radius of the courthouse) and the percentages in the jury venire (34% and 8%, respectively, for Hispanics in 1979, for example). This Court rejected these figures as significant on the basis that the relevant "community" should have been the Southeast Judicial District.

5. On the basis of not previously available information, petitioner has determined that with respect to Hispanics, the disparities were substantially greater based upon the Southeast Judicial District than based upon the 20-mile radius. Specifically, the population of the judicial district was 40.24% Hispanic, yet only 8% Hispanics found their way onto the jury venire. **The disparities, calculated in the manner this Court said they should be, are, to the knowledge of expert Dr. J. Dennis Willigan, "the highest set of disparities for any judicial district, at any time, in the State of California."** This cannot be accounted for by any mechanism other than the county's admitted practice of deliberately removing potential jurors from the Hispanic sections of the district and sending them to serve in the downtown courthouse. (See Exhibit Q, Declaration of Dennis Willigan).

6. An evidentiary hearing was held at which Mattson called two witnesses to establish his prima facie demonstration of unconstitutional jury selection procedures: Mr. Raymond Arce, Director of the Juror Services Division for Los Angeles Superior Court (RT 438), and Dr. Edgar W. Butler, Professor and Chair of the Department of Sociology at the University of California at Riverside. *See also People v. Harris*, 63 Cal.3d 63, 64 (1984) ("Dr. Butler holds degrees in sociology and demography and has conducted studies

of jury panels in all of the judicial districts in Los Angeles County. His qualifications are not challenged, and his work has been the basis for similar motions in other cases"). Through these witnesses, Mattson produced an extensive record to demonstrate that the jury selection procedures employed in the county were systematically skewed to exclude proportionate representation of minority jurors in Norwalk Superior Court.

7. The crux of the defense presentation consisted of Dr. Butler's findings, based on data obtained from Jury Commissioner Arce, that from 1979 to 1985 African-Americans were underrepresented on the Norwalk venires by 55% to 80%, and Hispanics by 49% to 77% over that six-year period.

8. Both Dr. Butler and Mr. Arce acknowledged that minority jurors were unequally distributed among the county's several courts. Dr. Butler explained that the imbalance was due to the county's failure to adequately compensate in its jury selection techniques for several crucial factors. First, the county has complied with the rule that no juror shall be required to serve at a distance greater than 20 miles from his or her residence (Code of Civil Procedure § 203) by creating a series of 20-mile regions for each district—but the boundaries of these regions are not fixed and thus each 20-mile region overlaps portions of the adjacent regions. Because the Central District has a heavy demand for jurors, it draws first and removes a high percentage of minorities from those portions of its 20-mile region that overlap with the 20-mile regions of other judicial districts, including Norwalk. The result is that Norwalk's jurors are drawn solely from those portions of its 20-mile region that do not overlap with the Central District's 20-mile region. Thus, Norwalk's actual juror draw comes from only a small fraction of its 20-mile region and this sub-region of actual draw is predominantly white and suburban.

9. Dr. Butler proposed a simple and economical solution: the 20-mile regions for each judicial district must be definitively drawn. The selection of jurors for each judicial district would then come from the entirety of its 20-mile region in a two-step

process: (1) a random selection of census tracts within the 20-mile region, and (2) a random selection of jurors from within each tract. Under this procedure, the minority population of each 20-mile region would necessarily be represented in every venire because the selection would include a representative sample of census tracts from throughout the district's 20-mile region, not just those areas clear of any overlap within the Central District.

10. The prosecution called no witnesses and confined its case to argument based on the cross-examination of appellant's witnesses.

11. In sum, appellant established an unrebutted prima facie showing of systematic underrepresentation in the Norwalk venires and further demonstrated how this impermissible underrepresentation could be cured by the Jury Commissioner in a simple and economical fashion. Under these circumstances, the trial court erred in denying appellant's motion to quash the venire and appellant's convictions should have been reversed because of the unconstitutional composition of the venire from which his jury was selected.

12. As a means of maintaining efficient judicial administration over the large geographical area and huge population of Los Angeles County, the Superior Court of Los Angeles has been divided into 11 separate districts, the Central District and 10 branch courts. (Superior Court Rules, Rule 300, § 1).[15] These 11 judicial districts are not separate courts with exclusive jurisdiction over offenses committed within their boundaries,

---

[15] Superior Court Rule 300, § 1 provides as follows:

> Sessions of the court shall be held in districts designated as follows: Central District, sitting in the Civic Center, Los Angeles; East District, sitting in Pomona; North Central District, sitting in Burbank and Glendale; Northeast District, sitting in Pasadena; North Valley District, sitting in San Fernando and Lancaster; Northwest District, sitting in Van Nuys; South District, sitting in Long Beach; South Central District, sitting in Compton; Southeast District, sitting in Norwalk; Southwest District, sitting in Torrance, and West District, sitting in Santa Monica.

however. (Superior Court Rule 300, §§ 2 and 3, indictments must be filed in the Central District but all other criminal cases may be filed either in the Central District or where the offense was committed, or the preliminary hearing held); (Superior Court Rule 301, all departments in any district designated to hear criminal cases shall be designated as the criminal division of the Los Angeles Superior Court). Furthermore, cases may be transferred from one district to another in the interests of judicial economy. (Superior Court rule 300, §§ 5-6). Although Code of Civil Procedure §§ 193 and 197 provide that jurors are to be drawn from a fair and representative cross-section of the population of the area served by the court, these provisions are qualified in the County of Los Angeles by the 20-mile rule: no juror is required to serve at a distance greater than 20 miles from his or her residence. Code of Civil Procedure § 193: "A trial jury is a body of persons returned from the citizens of the area served by the court. . ." Section 197: "It is the policy of the State of California that all persons selected for jury service shall be selected at random from a fair cross section of the population of the area served by the court. . . ." Section 302: ". . .[I]n the County of Los Angeles no juror shall be required to serve at a distance greater than 20 miles from his or her residence."

13. Thus, three distinct regions must be kept in mind. First is Los Angeles County itself. Los Angeles County is made up of 4300 census tracts. (RT 519).[16] The initial list used by the Juror Services Division to contact potential jurors for all the courts in the county comes from voter registration lists and Department of Motor Vehicles ("DMV") lists for the entire county. (RT 438-439).

14. Next are the 11 judicial districts, which are administrative divisions of the Los Angeles Superior Court. The Superior Court located in Norwalk, where the trial in this matter took place, is designated the Southeast Judicial District. (RT 513). This district is

---

[16] For this one section of the petition, the Reporter's Transcript cites are to the record in *People v. Mattson*.

comprised of 173 census tracts. (RT 555). Its geographical area is specifically mapped out in the Los Angeles County Superior Court Rules.

15. Finally, the operation of the 20-mile rule[17] has created another level of overlapping and unfixed areas within Los Angeles County that are not coextensive with the judicial districts. For example, the jurors summoned to serve at the Norwalk court in the Southeast Judicial District come from an area that includes the judicial district but also encompasses a much larger area beyond it. (RT 555-559). Thus, although there are only 173 census tracts in the Southeast Judicial District (RT 555) ("Norwalk"), there are 700 census tracts[18] in the 20-mile region from which jurors may be assigned to Norwalk. (RT 513, 524-525).

16. Because defining a 20-mile arc around each courthouse results in overlapping 20-mile regions, these areas are inherently flexible. (RT 494). As Mr. Arce explained, "These boundaries, if you will, are going to be fluid, and it depends on the number of courts that are requiring jurors at a future date and the number of jurors and where they come from in the County, whose names are being selected." (RT 494). For example, the outer rim of any 20-mile region may also be included in the 20-mile region of adjacent judicial districts. The first of those districts needing jurors draws the eligible jurors from the common area, which would at any specific time redefine the 20-mile region for at least one of the other districts. See Mr. Arce's example at RT 494, and Dr. Butler's example at RT 574. The unfixed characteristic of the 20-mile regions is exacerbated by the fact that the Juror Services Division apparently periodically redefines

---

[17] If plotted on a map, the designated 20-mile arc extending out from each courthouse site is actually a 15-mile area (RT 525), in order to provide a cushion of 5 miles for the actual driving distance (RT 165). It will be referred to here, as in the hearing, as the 20-mile region.

[18] In September of 1985, the Juror Services Division expanded the 20-mile region to include 247 census tracts (RT 315, 525, 335). Because the change was not made until September 30, 1985, the relevant statistics will refer to the 700-census-tract 20-mile-region. (RT 315).

the areas. In September of 1985, for example, the 20-mile area for Norwalk was expanded by 42 census tracts. (RT 513, 525, 533).

17. In sum, there are three different and progressively smaller geographical areas that are relevant to the jury selection process in Los Angeles County: first, the county itself, from which names of prospective jurors are randomly selected; second, the overlapping and unfixed 20-mile regions, from which jurors are assigned to specific courthouses; third, the administrative divisions of the County Superior Court system, e.g., the Norwalk Southeast Judicial District. These districts are significantly smaller than the 20-mile areas from which jurors are assigned to their courts.

18. As Director of Juror Services, Mr. Arce was responsible for developing procedures for administration of the jury system. (RT 438). The procedures utilized to provide qualified jurors to the courts of Los Angeles County can be summarized by identifying three stages of activities. First, the names of potential jurors are randomly selected from DMV and voter lists for the entire county and an initial questionnaire is mailed to them. Second, eligibility for jury service is determined by Juror Services Division staff members on the basis of the answers provided by the returned questionnaires. These two steps result in the selection of qualified prospective jurors. The last step in this process is the assigning of jurors from the qualified list to a specific courthouse, according to court need and the 20-mile rule.

19. Los Angeles County uses two sources in drawing up its initial juror list: the list of registered voters in Los Angeles County, and the DMV list, comprised of licensed California drivers, including non-drivers with California identification cards, who reside in the county. (RT 438-439). The voter list is currently designated the "primary list." A computer randomly selects a certain percentage of names from the primary list, depending on the projected need for jurors, e.g., 20%. An identical percentage sampling is then taken from the secondary list, the DMV list. This sampling is subjected to a checking process to

eliminate the possibility of duplicate names before it is used to supplement the primary list. The checking process consists of comparing the DMV sampling to the entire voter list and deleting any names from the DMV sample that also appear on the registered voters list. Then only the "unique" names, i.e., people on the DMV sampling who are not registered voters, are used to supplement the primary list. (RT 439-441).[19]

20. Prospective juror affidavit questionnaires or initial questionnaires (to distinguish them from the questionnaires filled out by jurors actually appearing at the courthouse at the last stage of the jury selection process) are then mailed to people on the supplemented primary list. (RT 441-443). Approximately 800,000 forms are sent out each year. (RT 441). These forms request information that will enable the Juror Services Division to determine whether a person is qualified as a juror: for example, citizenship, ability to understand English, residence, age and felony convictions. (RT 479). Finally, information is requested as to claims of inability to serve as a juror based on undue hardship. This category includes medical or financial hardship, care of others, or prior jury service during the past 12 months. (RT 480). No mention is made of race or ethnic origin. (RT 481).

21. In fiscal year 1984-85, 71.3% of the initial forms mailed out were returned. (RT 444). Of the 29% that were not returned, half were returned to the Juror Services Division by the Post Office as undeliverable. (RT 454-455). Mr. Arce's office makes no attempt to follow up on the unreturned questionnaires by sending out second notices. (RT 444). This is not due to a lack of funds, but rather reflects a cost-benefit determination

---

[19] In previous years, the DMV list was designated as the primary list, which was then supplemented with "unique" names from the voter registration list. In the fiscal year 1984-85, the procedure was reversed (RT 144), with the result that initial response by prospective jurors has increased from 65 to 71%. The increased response rate is apparently due to the fact that voter registration lists are more current and accurate with respect to name and address change than is the DMV list. (RT 654-854).

made by his office that a follow-up procedure would only add a net 3% of people to the available jury pool, so that money would be better spent in making initial contacts. (RT 445).

22. A staff of jury interviewers inspects the returned forms and, on the basis of the answers provided, determines whether a person is qualified, or whether the person should be exempted or excused from service. (RT 443). In 1984-85, for example, almost half of those answering were excused on the grounds of hardship. (RT 452). Altogether, 67% of the people who answered were exempted or excused. (RT 452, 455).[20] Only claims of hardship made in writing are considered in the excusal process and the excusal determination is not made on the basis of race or ethnic origin. (RT 483). The remaining 33% were qualified as jurors.

23. Once jurors are qualified, they are assigned to the courts that need jurors for a certain date. A computer makes the assignment by factoring in two criteria: first, the courts that require jurors, and secondly, the distance in miles from a juror's residence to the court. First, the juror's name is randomly selected and then the computer compares the distance from that juror's residence to all the courts requiring jurors for a certain date. The juror is assigned to the court closest to his or her residence. (RT 465). Although jurors must be assigned within a 20-mile radius from their homes (RT 475), on the average, a juror only travels 8-10 miles (RT 466).

24. Although the Juror Services Division has undertaken investigations, on its own initiative and at the direction of the courts, to study ethnic and racial breakdowns in

---

[20] In fiscal year 1984-85, 804,835 people returned the initial questionnaires. Of this number, a total of 362,720 were excused as ineligible, exempt or for hardship. Individual hardship (medical, financial, care of others, students and transportation hardship) accounted for 491,959 excusals; another 36,381 were ineligible as non-citizens, nonresidents or insufficient knowledge of English, felony convictions, prior jury service or military; and 4,996 were exempt for community hardship, i.e., peace officers, judges, etc.

jury venires (RT 467-470), the office does not attempt to compensate for racial or ethnic imbalances or geographical disparities within the 20-mile regions. The only actions taken with respect to the jury selection procedures have been on a countywide basis. (RT 470).

25. All the information studied by Dr. Butler was initially collected by Mr. Arce, who provided Dr. Butler with the data for the purposes of this hearing. (RT 510-511, 538). Dr. Butler made his findings on the basis of statistical evaluations of two types of documents. The first type was 10 "impanelment lists," or lists of eligible jurors computer-assigned to the Norwalk courthouse and summoned there for service during the period from July 15, 1985 to September 30, 1985. Dr. Butler also utilized Norwalk impanelment lists for the period from November 13, 1984 to March 4, 1985. (RT 510-512).

26. The impanelment or summons list includes the prospective juror's name, address and census tract number. From these pieces of information, the percentage of Spanish-surnamed[21] people on the list can be ascertained, using the Department of Justice Spanish surname list. (RT 510-511).

27. Of the people summoned by the impanelment list, only 50-60% actually appear at the courthouse. (RT 511). Those that do appear fill out a juror questionnaire. (RT 511).[22] These questionnaires were the second type of document used by Dr. Butler in his analysis. They provide the following information: age, sex, marital status, race, nearest intersection to residence, last grade of school completed, occupation, payroll title, annual family income, and, if the person is of Hispanic origin, whether he or she is Mexican,

---

[21] The terms Spanish-surnamed and Hispanic will be used interchangeably. *See People v. Trevino*, 39 Cal.3d 667, 684 (1985) (the term Spanish-surnamed is sufficiently descriptive of Hispanics as to constitute a cognizable group for cross section analysis); *see also Castaneda v. Partida*, 430 U.S. 482, 486 fn.5 (1977).

[22] This questionnaire is to be differentiated from the initial juror questionnaire mailed to a certain percentage of the people from the supplemented primary list, which is used to determine juror eligibility before the second level of selection and assignment is carried out.

Puerto Rican, Cuban or other. (RT 538). Dr. Butler's study included Norwalk jury questionnaires from 1979 to 1985. (RT 529-533).

28. Dr. Butler was also in receipt of a list of the census tracts that the Juror Services Division has designated as the 20-mile region for the Southeast Judicial District of Norwalk. (RT 511). Based on his analysis of this information, Dr. Butler made the following findings.

29. Because the impanelment or summons list provides last names, but does not mention race, Dr. Butler was able to make comparisons for Hispanics at the level of summoning. Similar comparisons for African-Americans could of course not be made at this stage of the jury selection process. (RT 514).

30. According to U.S. Census Bureau 1980 census studies, the 700 census tracts constituting the 20-mile region for Norwalk has a population that is 34.8% Hispanic. (RT 512-513). The 10 summons lists from September and October of 1985 show that during that time only 15.1% of the persons summoned from that region were Hispanic or Spanish-surnamed. (RT 513-514). A comparison between the 1984 summons lists and the population yielded similar results: from a population that was 34.8% Hispanic, only 17.8% of the people summoned in 1984 were Hispanic. (RT 514, 529-530). Thus, Dr. Butler found that in the relevant period of 1985, Hispanics were underrepresented on the summons lists by -58%, and in 1984 by -49%. (RT 514, 529-530).[23]

31. From his analysis of the jury questionnaire forms filled out by those prospective jurors who were summoned and then actually appeared at the Norwalk courthouse for jury duty during the relevant time periods, Dr. Butler made these findings.

---

[23] These percentages represent the comparative disparity standard which "measures representativeness by the percentage by which the probability of serving is reduced for people in a particular category or cognizable class." *People v. Harris,* 63 Cal.3d at 65, quoting Kairys, et. al., Jury Representativeness: A Mandate for Multiple Source Lists (1977) 56 Cal.L.Rev. 776 at 790.

32. Compared to a countywide African-American population of 11.1% and an African-American population in the Norwalk 20-mile region of 16.3%, only 3.2% of the jurors who appeared for jury duty in the 1985 period were African-American. (RT 517). This translates into a comparative disparity of -80%, i.e., African-Americans were 80% less likely to appear for jury duty at Norwalk than their numbers in the community would suggest (RT 532), and an absolute disparity of 16.3% minus 3.2% or 13.1%.

33. Although the 20-mile region around Norwalk from which jurors are assigned is composed of 34.8% Hispanics,[24] only 16% of the jurors appearing for jury duty at the courthouse during the 1985 time period were Hispanic. This represents a comparative disparity of -58%. (RT 518, 527-529).

34. From an evaluation of questionnaires administered by Mr. Arce to jurors appearing at the Norwalk courthouse from 1979 through 1984, Dr. Butler determined that the underrepresentation of both African-Americans and Hispanics on the Norwalk venires is a long-term problem. The findings are succinctly presented in these charts. The absolute disparity is by definition the number in column 2 minus the number in column 1. An absolute disparity in excess of 10% is generally accepted as creating a prima facie showing of violation of constitutional requirements for representativeness of a jury venire.

---

[24] At RT 815 the transcript indicates that the Hispanic population of the 20-mile region is 30.8%. This is apparently a typographical error. (See RT 514, 527-528, clearly indicating the Hispanic population is 43.8%).

Year	Hispanic Population of the 20-mile Region from Which Jurors are Drawn	Percentage of Hispanics in the Norwalk Venires	Comparative Disparity	Absolute Disparity*
1979	34.8%	8%	77%	26.8%
1980	34.8%	13.6%	61%	21.2%
1982	34.8%	10.6%	70%	24.2%
1984 (part)	34.8%	17.1%	58%	17.7%

Year	African-American Population of the 20-mile Region	Percentage of African-Americans in Norwalk Venires	Comparative Disparity	Absolute Disparity
1979	16.3%	5.1%	69%	11.2%
1980	16.3%	7.4%	55%	8.9%
1982	16.3%	6.2%	62%	10.1%
1984	16.3%			
1985	16.3%	3.2%	80%	13.1%

(RT 925-335; CTS I at 41-44; hearing exhibits).

35. From the impanelment or summons lists, which include the census tract number of the summoned juror's residence, Dr. Butler plotted the area on a map from which the jurors actually appeared. He discovered a gross geographical disparity in the supposed random juror assignment: while one census tract sent 57 jurors to Norwalk during the 1985 period studied, 504 of the census tracts did not contain a single summoned juror during the same period. Sixty-eight percent of the census tracts within the 20-mile region from which jurors were supposedly being drawn did not have a single juror summoned. (RT 535).

36. The map showed that jurors were not assigned to Norwalk courthouse from the entire 20-mile region: they consistently came from a much more restricted area, a very narrow section of that region. (RT 536-537). Thus, 67-68% of the 700 census tracts had absolutely no representation in the Norwalk venires. Consistent with the statistics demonstrating an underrepresentation of African-Americans and Hispanics among the jurors who are summoned and appear, the census tracts providing the great bulk of the jury panels are white, Anglo areas. (RT 539).

37. The problem, as both Mr. Arce (RT 472) and Dr. Butler recognized, was one of maldistribution of minority jurors among the several courts (RT 571, 574, 576).

> Mr. Arce: "The problem is one of distribution" (RT 472); Dr. Butler: "What you find is
> that the problem is not whether there are qualified jurors in these census tracts or not, but they are not being summoned to this courthouse. And so what you wind up with then is a maldistribution of jurors" (RT 571); "[I]t's a distributional problem" (RT 574).

38. The skewed distribution pattern cannot be explained by positing an abundance of qualified jurors in those census tracts sending the majority of jurors to the Norwalk courthouse, because every census tract in Los Angeles County has qualified jurors in it. (RT 571). Rather, as Dr. Butler explained, the imbalance results from the county's failure to compensate for two factors: the relatively heavy need for jurors in the Central District of the Los Angeles Superior Court system and the fluid and overlapping regions from which prospective jurors are drawn under the 20-mile rule. (RT 774-776).

39. The Central District courthouse, because of its heavy trial calendar, draws the lion's share of total jurors countywide: 33-34% of the total. And because of its central location, it draws a high percentage of minority jurors from its 20-mile region. This draw then vacates the peripheries of the central District's 20-mile region of minorities. Those peripheral regions, because of the overlapping and unfixed boundaries of the 20-mile arcs, also constitute peripheral areas or sections of other judicial district 20-mile regions.

Accordingly, when the Norwalk court's need for jurors comes up on the computer, the only remaining jurors who are "closest" to Norwalk are from Anglo areas within the Norwalk 20-mile area. (RT 574-576). The plausibility of this explanation is borne out by the fact that while juries in the Central District have an overrepresentation of minorities, juries in all the other branch courts suffer from underrepresentation of minorities. (RT 574).

40. Dr. Butler provided a solution to this under-representation—one so simple and direct that he estimated it would take less than $10,000 to implement. (RT 577-579). First, the area from which jurors are to be assigned to Norwalk must be *definitively* drawn. The boundary cannot shift. Once the area is designated, jurors can be randomly selected and summoned by census tracts. If the Norwalk court needs 150 jurors, for example, the computer would *first select 150 census tracts at random, and then randomly select qualified jurors within those tracts*. The minority population of each bounded area would necessarily be represented, because the assignment would include a representative sample of census tracts, and thus of jurors. (RT 577, 579-581).

41. This process would ensure selection of a fair cross-section from the community, because it would no longer be possible that 57 jurors would come from one census tract, while 67-68% of the census tracts went unrepresented. Instead, each tract would provide one juror. Once that tract is randomly selected, qualified jurors within it would have an equal opportunity to be selected, in a manner completely unrelated to race or ethnic origin. Because both the tract and the juror would be randomly selected, there would be no discrimination, and a fair cross-section would be assured (RT 579). Dr. Butler discussed this plan and its cost with Mr. Arce. (RT 578-579).

42. The prosecution chose to present no witnesses of its own to rebut appellant's showing of a fair cross-section violation. In its closing argument to the trial court, however, it did utilize portions of Mr. Arce's testimony. The testimony relevant to the prosecution's attempted rebuttal is scattered throughout Mr. Arce's and Dr. Butler's

testimony, and so is organized around the three principal arguments put forward by the prosecution in its closing argument.

43. Mr. Arce testified that from a *countywide* perspective, there was no racial disparity between the percentage of African-Americans in the over 18 years of age population of the county, and the percentage of African-Americans summoned and appearing to serve as jurors in the county. For example, the 1980 census figures show the percentage of presumably eligible African-American jurors in the county at 11.4%, and studies indicated that 13.33% of the jurors serving in Los Angeles County are African-American. (RT 472). Although Mr. Arce did conclude that countywide there was "an abundance of African-American jurors in the system," he admitted that the "problem is one of distribution." (RT 472).

44. Mr. Arce also testified that at the judicial district level, "[t]he Southeast District has an adequate representation of African-Americans." He based this conclusion upon a comparison between the percentage of African-Americans appearing for jury duty in Norwalk (3.6% in September and October of 1985) and the percentage of African-Americans in the population of the Southeast Judicial District (2.9%). (RT 472-474). He thus compared the percentage of African-Americans in the venires chosen from the *20-mile region* to the percentage of African-Americans in the *judicial district*, even though he admitted that the venire was not in fact selected from the Norwalk Southeast Judicial District, but from an area "well beyond the boundaries of the Judicial District" (RT 493), i.e., the 20-mile region, an area whose population is 16.3% African-American (RT 517).

45. Mr. Arce claimed that 40.8% of the Hispanic population of the Southeast Judicial District, and indeed of Los Angeles County, was probably not U.S. citizens[25] (RT

---

[25] "[W]e developed a range of between 43 percent to 84 percent that would have to be applied to figures for Los Angeles County in order to try to come up with a number of Hispanics that would be jury eligible or citizens." (RT 486).

486). In reliance on this figure, he concluded that the Hispanic population of the Southeast Judicial District that was presumably jury eligible was not 34.7% (the U.S. Census figure of Hispanics over the age of 18), but only 20.5%.[26] (RT 488).

46. Mr. Arce based this claim of citizenship on a U.S. Census Bureau statistic that 40.7%[27] of persons 18 years and over in Los Angeles speak English "not well or not at all." Mr. Arce also testified that a Census Bureau chief had informed him that 14.9% of the 1980 Census voting-age citizens of Los Angeles County identified themselves as Hispanics. (RT 486). From these two statistics, Mr. Arce concluded that between 37% and 48% of the Hispanic population in Los Angeles County did not have American citizenship. (RT 486-487). How he arrived at such a range, and of what relevance was the percentage of non-English speaking people to the percentage of Hispanic-American citizens in Los Angeles County, Mr. Arce did not explain. Nevertheless, he multiplied the Hispanic population of the Southeast Judicial District (34.7%) by 40.8% (presumably the percentage of people in Los Angeles County who do not speak English well) to conclude that the Southeast District's Hispanic American *citizen* population was only 20.5%. (RT 4884).

47. Dr. Butler testified that there is no information available, either at the census tract level or at the regional level, from which one could determine either citizenship or language capability of an ethnic group. (RT 541-544, 549). According to Dr. Butler, no one, not even the Census Bureau experts on undocumented aliens, has information available as to the number of non-citizens in any given area. (RT 541-542). Without such information, Dr. Butler emphasized that it is only speculation that any particular portion of the Census-counted 34.8% Hispanics is non-citizen. (RT 515-516, 550). Dr. Butler

---

[26] "I think perhaps if we. . . .very crudely apply a figure of 40.8. . . .would leave us with 20.5 [percent citizens in Los Angeles County]." (RT 488).

[27] This figure is presumably somewhere between 40.7 and 40.8% as Mr. Arce at one time refers to it as 40.7% (RT 486) and later as 40.8% (RT 488).

mentioned a variety of factors that would have to be considered before making any conclusion as to what portion of the Hispanics counted by the 1980 census has American citizenship.

48. First, Census Bureau officials estimate that the 1980 Census *undercounted* the Hispanic population by at least 5.5%; Dr. Butler was of the opinion that the undercount in Los Angeles County would be even higher. (RT 542, 550-51). Thus, Mr. Arce reduced the number of *counted* Hispanics in the Southeast Judicial District through use of a figure that includes a significant portion of *uncounted* Hispanics in Los Angeles County.

49. Secondly, Dr. Butler stated that the use of registered voters to support a claim that 40.8% of Hispanics in Los Angeles are not citizens would not withstand scrutiny. First, a much lower percentage of eligible Hispanic register to vote than do Anglos; and secondly, there is no English-speaking prerequisite for voter registration and no established relationship between language and eligibility to vote. (RT 581-582).

50. According to Dr. Butler, even if one knew the proportion of non-citizen Hispanics in Los Angeles County, that percentage would not necessarily be valid for a specific region of the county, such as the 20-mile Norwalk area. In fact, there were good reasons to believe that the Hispanic citizen percentage of the Norwalk areas was *higher* than the county average. "When you start talking about middle class areas in Norwalk and suburban areas, then my belief is most of these people are not undocumented but, in fact, are citizens who are middle class and . . . upper middle class, and likely to be citizens." (RT 550).

51. Dr. Butler also pointed out that Mr. Arce failed to take into account the fact that estimates of non-citizen Hispanics in Los Angeles may include children under the age of 18 (RT 552) and the remigration phenomenon. (RT 551).

52. In conclusion, Dr. Butler testified that it was "completely erroneous" to assume, as did Mr. Arce, that 37-48% of the Spanish-surnamed people in Los Angeles

County were not citizens. There is absolutely no data to substantiate such a claim. (RT 552-553).

53. Although the prosecution argued that the racial and ethnic imbalance in the Norwalk venires was due to nonresponse to initial juror questionnaires, there was no evidence presented to substantiate such a claim.

54. Mr. Arce testified that in 1985, almost 29% of the people initially contacted by his office either did not receive their forms or did not return them. (RT 444). However, there was no evidence to indicate that the non-response of these people had any impact on the underrepresentation of minorities on the venires finally selected.

55. On the contrary, Mr. Arce testified that his office had been unable to determine the racial or ethnic background of the persons whose forms were undeliverable. (RT 483). Dr. Butler testified that there was no information available as to the impact that non-response has on the racial and ethnic makeup of the venires. (RT 546-547). Similarly, of the more than one-half of the people contacted who were excused from service, there was no evidence at all that excusals were more prevalent in the minority communities than in the Anglo communities. (RT 566).

56. The only available evidence refuted the prosecution's argument with respect to Hispanics, who were somewhat more likely to appear at the courthouse after being summoned than was the rest of the population. (RT 572-573). In any event, there is a further problem with the prosecutor's reliance on the high rate of non-response as a potential explanation for a skewing on the composition of a venire. Where the county makes no effort to follow up non-responses and permits in effect a voluntary jury service system, more due process questions are raised than fair cross-section questions are resolved.

57. In *Duran v. Missouri*, 439 U.S. 357, 364 (1979), the Supreme Court set out a three-part test for analysis of cross-section claims:

> In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a `distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

58. When a prima facie violation is demonstrated, the burden then shifts to the prosecution to come forward with available evidence of explanation and justification, so as to enable the court to determine whether the county is doing all that can reasonably be expected to achieve the constitutional goal mandated in *Wheeler*. *People v. Buford*, 132 Cal.App.3d 288, 299 (1982).

59. Petitioner met all three prongs of the *Duran* test.

60. Petitioner met the first prong of the *Duran* test by demonstrating that both African-Americans and Hispanics were underrepresented in the jury venire in the Southeast Judicial District of Los Angeles County at Norwalk. Both African-Americans and Hispanics are indisputably cognizable and distinctive groups for purposes of fair cross-section analysis. *People v. Harris*, 36 Cal.3d at 51; *Hovey v. Superior Court*, 28 Cal.3d 1, 20 fn. 45 (1980).

61. Petitioner met the second prong of *Duran* by showing that African-Americans and Hispanics were substantially underrepresented in the Norwalk venires in comparison to their numbers in the community, as defined by the 20-mile radius of the courthouse.

62. To define the Southeast Judicial District as the "community" when in fact the operation of the 20-mile rule means that jurors are being assigned to Norwalk from a much larger area, the 20-mile region, would be to condone the kind of misleading comparisons made by Mr. Arce. Although qualified jurors are assigned to Norwalk from the 20-mile region, which is 16.3% African-American, Mr. Arce testified that venires comprised of 3.2% African-Americans constituted a fair representation because the administrative

boundaries of the southeast Judicial District were made up of 2.9% African-Americans. This is like asserting that an all-white school, in a district composed of over 50% minority students, is not excluding African-Americans and Hispanics, because none of them live in the area directly north of the school building.

63. Petitioner has clearly shown that the minority makeup of the Norwalk jury panels was not fair or reasonable when compared to the total number of African-Americans and Hispanics in the 20-mile area from which the jurors are selected. According to 1980 Census figures, the population of the 20-mile region is 34.8% Hispanic and 16.3% African-American. Yet only 15.1% of the persons summoned from the 20-mile region were Hispanic. Of the jurors who answered the summons and appeared at Norwalk during the test period, only 16% were Hispanic (compared to 34.8% of the population) and only 3.2% were African-American (compared to 16.3% of the population), representing comparative disparities of -58% and -80%, respectively. Over a 5-year period, the comparative disparity of Hispanics ranged from -49% to -77%; for African-Americans from -55% to -80%[28]. See chart.

64. The third prong of the *Duran* test is satisfied because Mr. Reno showed that the underrepresentation is due to a systematic exclusion of the group in the jury selection process. It is settled that an exclusion is systematic if it is "inherent in the particular jury-

---

[28] This Court found the comparative disparity standard to be the preferable method of showing disparity in *People v. Harris*, 36 Cal.3d at 56. Comparative disparity is there explained:

> "[I]n a fair, cross-sectional system, the probability of any eligible person being included in the source (or in the final pool) would be the same for every eligible person, regardless of race, ethnic background, sex, age, or socio-economic status. The comparative disparity standard measures representativeness by the percentage by which the probability of serving is reduced for people in a particular category or cognizable class." *Id. at* 576-577, quoting Kairys, et al., Jury Representativeness: A Mandate for Multiple Source Lists (1977) 56 Ca. L.Rev. 776 at 790.

selection process utilized."

65. Based on analyses of the ethnic makeup of the jurors who were summoned to Norwalk (in the case of Hispanics) and on analyses of the racial and ethnic makeup of jurors who actually appeared for jury duty (in the case of both Hispanics and African-Americans), appellant has shown a long-term and gross disparity in the percentage of these minorities compared to their numbers in the total population. Over a five-year period, Hispanics were underrepresented by 49% to 77%. African-Americans were underrepresented by 55% to 80% over the same period.

66. The second and third prongs of the prima facie case can be satisfied by statistics alone. *See People v. Buford*, 132 Cal.App.3d at 296. But Mr. Reno's case does not rest solely on statistics. Mr. Reno has presented evidence suggesting a plausible explanation for the gross racial and ethnic imbalance of the Norwalk venires by identifying precisely when in the jury selection process the systematic exclusion took place, and by identifying the interaction of factors which cause the underrepresentation, i.e., the heavy draw of the Central District and the local assignment from overlapping 20-mile areas. In addition, appellant has demonstrated the validity of his explanation by showing the extreme geographical maldistribution of jurors actually assigned to Norwalk. Finally, Mr. Reno has presented a plausible remedy, which is both simple and inexpensive, and which had been communicated earlier to Mr. Arce of the Juror Services Division.

67. In short, Dr. Butler's study of the jurors actually assigned to Norwalk during the test period revealed that of the 700 census tracts making up the 20-mile area, one tract sent a total of 57 jurors to the courthouse, while 67-68% of the total, or 504 census tracts, did not have a single juror summoned over the same period. It is this extreme geographical imbalance that accounts for the underrepresentation of minorities on the venires, i.e., only predominantly white Anglo tracts within the 20-mile region have jurors summoned. Dr. Butler also explained why the maldistribution occurs: the Central District's heavy demand

for jurors, which accounts for 33-40% of the total jurors countywide, tends to "use up" all the minority jurors in the 20-mile region of the Central District. But because of the overlapping quality of the regions, the periphery of the central district 20-mile region is also the periphery of adjacent 20-mile regions for the other judicial districts. Those outer portions of Norwalk's 20-mile region that coincide with the outer regions of the Central District are depleted of minority jurors by the Central District's heavy demand, and thus, when the needs of the Norwalk court come up on the computer, only jurors from white Anglo areas are available. Mr. Reno has shown that the overlapping, fluid boundaries of the 20-mile regions together with the central District's heavy demand for jurors, result in the extreme underrepresentation of African-Americans and Hispanics on the Norwalk venires.

68. Mr. Reno has therefore shown that the exclusion of minorities is systematic because it is inherent in the jury selection process. Dr. Butler demonstrated that the imbalance could be cured with a minimum of effort and expense by defining rigid 20-mile regions and then by randomly selecting first the appropriate number of census tracts and then eligible jurors from within those tracts. Once the tracts are randomly selected, each qualified juror within it would have an equal opportunity to be selected, and a fair cross-section would be assured.

69. When a prima facie violation is established, the burden shifts to the prosecution to come forward with available evidence of explanation and justification, so as to enable the court to determine whether the county is doing all that can reasonably be expected to achieve the constitutionally mandated goal of a fair cross-section. *People v. Buford*, 132 Cal.App.3d at 299.

70. In this case, the prosecution presented no witnesses. Instead, it relied on its cross-examination of Mr. Arce and Dr. Butler to explain and justify the racial and ethnic disparities in the Norwalk venires. Petitioner's statistical showing was not rebutted in any way. Indeed, the methods of evaluation used have been previously approved by this Court in

People v. Harris. 36 Cal.3d 36.

71. The prosecution did not meet its burden of coming forward with available evidence of explanation and justification. In fact it presented no evidence at all to explain or justify the gross disparities of the Norwalk venires. Instead, the prosecutor attempted to cast doubt on Mr. Reno's prima facie case in this closing statement by presenting arguments and theories unsupported by the facts. Such unsubstantiated theories cannot serve as a substitute for a showing that the county is doing everything it reasonably can do to achieve the constitutional fair cross-section requirements.

72. Arguing that "the County of Los Angeles is doing everything according to law" (RT 598), the prosecutor referred to evidence that the Juror Services Division did not use race or ethnicity in its initial random selection of potential jurors, nor in the eligibility, exemption and excusal procedures. This evidence, although edifying, completely misses the point in terms of rebutting Mr. Reno's prima facie case. Petitioner did not claim that the initial procedures caused the imbalance in the Norwalk venires. Petitioner presented a prima facie case of violation of the fair cross-section requirement which was the *inherent result of the skewed local assignment* of jurors within the 20-mile Norwalk area. Petitioner showed that the overlapping 20-mile regions combined with the Central district's heavy draw caused the underrepresentation. This showing was not rebutted.

73. Evidence that eligibility and excusal decisions are not based on race or ethnicity is irrelevant when Mr. Reno's evidence shows that those decisions are not causally connected to the disparities. Furthermore, it is settled that there is no requirement to show that the jury commissioner intended to discriminate against minorities. *People v. Harris*, 36 Cal.App.3d at 58. Discrimination can result from negligence or inertia, by failing to take affirmative action to prevent discrimination. *ibid.*

74. The prosecutor next attempted to explain away the underrepresentation on the Norwalk venires with a theory of "individual fault." (RT 565-570, 595-596). This argument

not only misses the mark in terms of the cause of the imbalance on the jury panels, it is totally unsubstantiated. Nonetheless, the prosecutor repeatedly argued that nonresponse to the initial juror questionnaires was beyond the county's control and that therefore the county must be deemed to be doing everything it can reasonably be expected to do. He made a similar argument regarding the excusal process.

75. First, such arguments insinuate that juror nonresponse or excusal is a cause of the venire imbalance. Quite to the contrary, Mr. Reno showed that the unfixed boundaries and the heavy demand of the Central District caused the underrepresentation. Second, the argument is based on completely unsubstantiated premises: (1) that minorities are more likely than Anglos not to respond to the initial juror mailing and (2) that minorities are more likely than whites to be excused for hardship. There were no facts at all presented at the evidentiary hearing to support the first claim. If anything, the evidence tended to show the opposite. Hispanics, for example, are somewhat more likely than Anglos to appear at the courthouse after a summons.

76. Neither was there evidence to support the prosecutor's assumption that excusals were more prevalent in the minority community than in white Anglo communities. In fact, Dr. Butler expressly negated such an assumption, "so far I have not seen any evidence one way or another in all the cases that I worked with and in listening to the testimony of Mr. Arce." (RT 1566).

77. Finally, the prosecution's argument also implies that the original contact pool contained a higher percentage of minorities than the group that was summoned or appeared. But this Court has already held that "[t]he representative character of those jurors [appearing at the courthouse], not of the `original contact pool,' is the proper basis for comparison." *People v. Harris*, 36 Cal.3d at 53.

78. Thus, regardless of whose "fault" it may be that a significant portion of the people initially contacted to serve as jurors do not respond and that an even larger portion

of those who are summoned do not appear, arguments based on these facts do nothing to dispel Mr. Reno's proof that Hispanics and African-Americans are grossly underrepresented among the people who do appear on the Norwalk venires.

79. As this Court noted in *People v. Harris*, it would be "preferable" if full and accurate statistics were available that detailed the precise percentage of the Hispanic population that has U.S. citizenship and the percentage of undocumented aliens. *Harris* held, however, that the makeup of a jury venire was properly compared to statistics of the total population, because jury-eligible statistics for Hispanics are almost impossible to obtain. Where requiring such statistics would place an insuperable burden on the defendant, the "preference must accede to tolerance." *People v. Harris,* 36 Cal.3d at 53-54, quoting *Foster v. Sparks*, 506 F.2d 805, 833 (5th Cir. 1979). When more refined figures showing the precise proportion of jury eligibles in the population are not available, "it is sufficient for the defendant to show a significant disparity based on the use of the total population." *People v. Harris*. 36 Cal.3d at 54.

80. Here Mr. Mattson used as a comparison base census figures showing the percentage of Hispanics over the age of 18 in the relevant communities. It is conceded that these figures do not reveal citizenship and that the 34.8% Hispanic makeup of the 20-mile Norwalk region represents a maximum. But where appellant has established a prima facie case on the basis of the best census figures available, his case cannot be explained away or justified by unsupported claims, unjustifiable manipulation of data and reliance on so-called "common sense" arguments engaged in by the prosecution.

81. Mr. Arce suggested that any census figure for the Hispanic population in Los Angeles, either in the 20-mile region or the Southeast Judicial District, should be reduced by 40.8% to arrive at a percentage of Hispanic-American citizens. He evidently based this conclusion on a finding of the 1980 Census Bureau that 40.8% of the people over 18 years of age do not speak English well or at all. He offered no support for his unstated premises:

that people who do not speak English well are not citizens and that everyone in Los Angeles County who doesn't speak English well is Hispanic.

82. Dr. Butler testified that no such information is available at either the census tract level or the regional level. "[T]he data are not in any form that you can determine [citizenship and language] at the census tract level or [the 20-mile area]" (RT 543-544); "[W]e do not know or do not have information as to whether what percentage of them are citizens or noncitizens." (RT 549). Contrary to Mr. Arce's claim, the Federal Census Bureau has reported to the U.S. Congress that "`[a] reliable estimate of the number of undocumented aliens residing in the U.S. is not available and is unlikely for the immediate future'." *People v. Harris*, 36 Cal.3d at 53-54, quoting Rep. to Cong. by Comptroller General, Number of Undocumented Aliens Residing in the United States Unknown, GGD-81-56 (Apr. 6, 1891) at 3-4.

83. Without statistics as to the numbers of undocumented aliens, Mr. Arce's claim that 40% of all census-counted Hispanics are not citizens is complete speculation. Dr. Butler pointed out that even if percentages of undocumented aliens were available, other facts would have to be considered before making a blanket statement as to how many of the Hispanics in the Norwalk 20-mile area are citizens. For example, the 34.8% Hispanic figure for the Norwalk 20-mile region is based on the census, and many of the undocumented aliens were not counted by the census. The Census Bureau itself estimates that the Spanish-surnamed population was undercounted in 1980 by at least 5.5%. If noncitizens are not counted in the census in the first place, it is obviously fallacious to reduce the number of Hispanics that were counted by a number meant to portray noncitizens.

84. Secondly, in "middle class suburban areas" like Norwalk, the number of noncitizens is likely to be much lower than the number countywide. Also, according to recent migration studies, many undocumented aliens re-migrate, which might account for a

higher figure of undocumented aliens, if those numbers are based on estimates of people crossing the border. One person might cross the border several times in one year.

85. In short, Mr. Arce's claim was shockingly unsubstantiated and totally undeserving of serious consideration. It can in no way serve to "explain" or "justify" appellant's showing of underrepresentation of Hispanics.

86. The prosecution also relied on Mr. Arce's spurious comparison between the percentage of African-Americans in the Southeast Judicial district and the percentage of African-Americans on the Norwalk venires to argue that the county was doing everything according to law. (RT 596). Where it is conclusively established that jurors are assigned to the Norwalk venires from the 20-mile region, comparing the percentages of African-American on those venires to the African-American population of the southeast Judicial district is totally meaningless and borders on fraud.

87. The African-American population of the 20-mile region, from which the jurors are selected, is 61.3% of the total population. The percentage of African-Americans on the venires drawn from the 20-mile region in 1985 was only 3.2% of the total. The fact that African-Americans make up only 2.9% of the population of the Southeast Judicial District is irrelevant because the Southeast Judicial district is no the geographic district from which jury venire selection occurs. *See O'Hara v. Superior Court*, 43 Cal.3d 86 [the jury panel must fairly reflect the minority population of the district from which it is chosen].

88. Both Mr. Arce and Dr. Butler were in complete accord that there was a "distribution problem" on the Norwalk venires. Nevertheless, because Mr. Arce perceives the base community for cross-section purposes to be either the county or the judicial district (RT 475), the jury commissioner's office makes no attempts at all to compensate for racial or ethnic imbalances at the 20-mile region level (RT 470). Only actions at the countywide level are undertaken.

89. Mr. Mattson demonstrated a plausible systematic explanation for the disparity subject to control by the court. Dr. Butler testified that there was a solution to the imbalance at the regional levels that would insure representative jury pools simply and inexpensively. Dr. Butler had discussed this solution with Mr. Arce.

90. The solution consists of (1) definitively drawing rigid boundaries for the 20-mile regions to eliminate overlapping and (2) reprogramming the random computer selection so that a preliminary random selection of census tracts within the 20-mile regions is made, and then jurors would be randomly selected from within those tracts.

91. Because the present imbalance is partially caused by the overlapping regions, which permits one district to have an overrepresentation of minorities, in effect "robbing" the other districts of minority jurors, it is imperative that any solution first fix the 20-mile regions from which jurors are drawn. The boundary cannot be allowed to "shift and slide" in the way that it presently does.

92. The next step ensures against the type of geographical maldistribution within the region which is manifested by the Norwalk venires, in which only a slice of the whole region is represented on the panel. Because of de facto housing segregation, uneven geographical selection of jurors necessarily will result in uneven racial and ethnic representation. This problem is solved by *first* randomly selecting census tracts within the region, and then randomly selecting an eligible juror from within the chosen tract. The minority population of each bounded 20-mile area would then be fairly represented because the venire would include a representative sample of census tracts. Yet because both the tract and the juror would be randomly selected, without reference to race or ethnic origin, there would be no discrimination.

93. Dr. Butler estimated that this procedure could be implemented for under $10,000. Given the availability of such a solution, the county is obviously not doing all that can reasonably be expected. Where the county has an affirmative duty to develop and

pursue procedures aimed at achieving a fair cross-section, its failure to compensate for the imbalance demonstrated in this case cannot be deemed reasonable. When a plausible solution is offered by an expert with Dr. Butler's qualifications, the county's inaction is even more unreasonable.

94. Petitioner has not only explained the cause of the underrepresentation of African-Americans and Hispanics on the Norwalk venires but has also shouldered the burden of demonstrating a simple and inexpensive cure for the problem. Based on this record, the trial court erred in denying Mr. Reno's motion to quash the venire and petitioner's convictions must be reversed because of the unconstitutional composition of the venire from which his jury was selected.

95. This Court dismissed the claim by asserting that the appropriate "community" for purposes of the analysis was not the population within the 20-mile radius from which jurors are actually selected but the judicial district where the courthouse sits. This was inconsistent with California law at the time of the evidentiary hearing. Moreover, it was inconsistent with the Sixth Amendment's requirement that jurors actually be drawn from the community.

96. Finally, had the calculations in this case been performed on the basis of the population of the judicial district rather than the population of the 20-mile radius, the disparities for Hispanics which would have been revealed would have been much *worse*. This is because the Southeast Judicial District has a much higher percentage of Hispanics than does the 20-mile radius. There were absolute disparities for Hispanics between the actual population and the population on the jury venires of 32.24%, 26.64%, 29.64%, 22.32%, and 25.14%, respectively, for the years 1979, 1980, 1982, 1984 and 1985, with a prima facie showing of constitutional violation is generally considered to be made with an absolute disparity of only 10%. These disparities are only explainable based upon the superior court's admitted and deliberate policy of removing potential jurors from the

Hispanic portions of the Southeast Judicial District and sending them for jury service to the downtown courthouse. See Exhibit Q, Declaration of Professor Dennis Willigan.

97. This Court, without relying on this testimony, also mentioned testimony that approximately 40% of the Hispanic population were non-citizens. On the record, reliance on that testimony would have been unreasonable because it was based upon unexplained and/or unreasonable assumptions. Moreover, it would not have been sufficient to rebut the prima facie showing of a Sixth Amendment violation made by petitioner, either as to African-Americans or as to Hispanics. With respect to African-Americans it was irrelevant, and with respect to Hispanics, there are still extraordinarily high disparities for the Southeast Judicial District, taking into account the percentage of noncitizens the superior court claimed to be present (see, e.g., Exhibit Q, Willigan Declaration).

98. Regardless of whether the 20-mile radius or the judicial district is the "community" for Sixth Amendment purposes, petitioner has shown that, in violation of the Sixth Amendment, there was no fixed "community" from which the jurors were drawn, and in addition and in the alternative, the jury venire was unrepresentative of minorities.

99. Based upon the above, petitioner was denied an impartial jury drawn from a fair cross-section of the community as guaranteed by both the state and federal constitutions and was also denied a fair trial and a reliable penalty phase.

CLAIM113: Petitioner's Rights Were Violated as a Result of Extreme Underrepresentation of Hispanics and African-Americans in the Jury Pool.

1. As set forth in Claim 112, petitioner's Sixth, Eighth and Fourteenth Amendment rights were violated because of extreme under-representation of Hispanics and African-Americans in the jury pool.

CLAIM 114: The Denial of A Fair Cross-Section of Jurors in the Guilt Phase Violated Petitioner's Constitutional Rights.

1. The Supreme Court has repeatedly stated that "death is different"; that is, the

death penalty is qualitatively different than any other criminal punishment. As stated in *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976), "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

2. The Supreme Court has reversed death sentences because some aspect of the sentencing process has compromised the reliability of the sentencing determination. *See Johnson v. Mississippi,* 486 U.S. 578 (1988); *Caldwell v. Mississippi,* 472 U.S. 320 (1985) (jury misled to believe that the appellate court ultimately would decide the appropriateness of the death sentence); *Eddings v. Oklahoma,* 455 U.S. 104 (1982) (mitigation evidence regarding emotional disturbance and troubled family history erroneously excluded from consideration by the jury in making its determination as to the appropriateness of the death sentence).

3. "[A] defendant convicted by [a properly death-qualified] jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt.* If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence -- given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment." *Witherspoon v. Illinois*, 391 U.S. 510, 520, n. 18 (1968).

4. The data strongly suggests that death qualification excludes a significantly large subset -- from 11% to 17% -- of potential jurors who could be impartial during the guilt phase of trial. Among the members of this excluded class are a disproportionate number of African-Americans and women. *See Grigsby v. Mabry*, 569 F.Supp. 1273, 1283, 1293-1294 (ED Ark. 1983) *(Grigsby II)* (citing studies).

5. Death-qualified jurors are more likely to believe that a defendant's failure to

testify is indicative of his guilt, are more rejecting of the insanity defense, more mistrustful of defense attorneys and less concerned about the danger of erroneous convictions. *Id.*, at 1283, 1293, 1304. This pro-prosecution bias is reflected in the greater readiness of death-qualified jurors to convict or to convict on more serious charges. *Id.*, at 1294-1302; *Grigsby v. Mabry,* 758 F.2d 226, 233-236 (8th Cir. 1985). The very process of death qualification -- which focuses attention on the death penalty before the trial has even begun -- has been found to predispose the jurors that survive it to believe that the defendant is guilty. *Grigsby*, 569 F.Supp., at 1302-1305; 758 F.2d, at 234.

6. The full exchange of ideas among the jury members is crucial to the trial process. "The desired interaction of a cross section of the community does not take place within the venire; it is only effectuated by the jury that is selected and sworn to try the issues." *McCray v. New York*, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting from denial of certiorari).

7. The task of ascertaining the level of a defendant's culpability requires a jury to decide not only whether the accused committed the acts alleged in the indictment but also the extent to which he is morally blameworthy. Especially in capital cases, where a defendant invariably should be charged with lesser included offenses having factual predicates similar to those of the capital murder charges, (*see Beck v. Alabama*, 447 U.S. 625 (1980)), it may be difficult to classify a particular verdict as "accurate" or "inaccurate." The Court in *Ballew* went beyond a concern for simple historical accuracy and questioned any jury procedure that systematically operated to the "detriment of . . . the defense." (435 U.S., at 236).

8. The very process of determining whether any potential jurors are excludable for cause under *Witherspoon* predisposes jurors to convict. One study found that exposure to the *voir dire* needed for death qualification "increased subjects' belief in the guilt of the defendant and their estimate that he would be convicted." Haney, On the Selection of

Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121, 128 (1984); *see Hovey*, at 73, 616 P. 2d, at 1349. Even if this prejudice to the accused does not constitute an independent due process violation, it surely should be taken into account in any inquiry into the effects of death qualification. "[The] process effect may function additively to worsen the perspective of an already conviction-prone jury whose composition has been distorted by the outcome of this selection process. . . ." (Haney, Examining Death Qualification: Further Analysis of the Process Effect, 8 Law & Hum. Behav. 133, 151 (1984)).

9. Any procedure that "[diminishes] the reliability of the guilt determination" must be struck down. *Beck v. Alabama*, 447 U.S. at 638. That result is required here.

CLAIM 115: Juror Zinn Committed Juror Misconduct in Violation of Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment Rights.

1. During trial, it came to light that one of the jurors knew one of the prosecution's key witnesses in the case, Officer Barclift of the Bell Gardens Police Department. Barclift was an investigator during the 1976 double homicide. He interrogated petitioner about the 1976 killings after petitioner's arrest in 1978. (RT 2339).

2. Juror Zinn was employed at a casino. Officer Barclift served as a police liaison for the casino. He worked closely with the personnel department in which Juror Zinn worked. (RT 2340). He saw her on a daily basis. (RT 2340). He was responsible for performing identity checks on all applicants for employment. (RT 2350).

3. When the court was told about the juror's potential bias, the trial judge suggested, "If you want, gentlemen, I will ask her some individual questions, if you want. Based on that I'd excuse her, too, but I'd leave it up to you." (RT 2340). Trial counsel did not excuse the juror, even after she admitted to knowing Officer Barclift during questioning.

4. Moreover, Juror Zinn was less than candid during her questioning. She had

lied on her juror questionnaire. One of the sections of the questionnaire was titled "Legal Training and Relationships With Persons In the Legal System." (CT 387).[29] That section asked if she had any friends or relations in law enforcement. Presumably, since she was not asked about anyone in law enforcement whom she knew during her voir dire, she did not mention Officer Barclift on the questionnaire. The jurors had sworn under oath to answer all questions "well and truly." (RT 217). The jurors were specifically informed that they were under oath when they filled out the questionnaires. (RT 217-8).

5. During voir dire, Juror Zinn was asked whether she would be inclined to believe the testimony of a police officer more than that of other witnesses and she said she would not. (RT 2104). Once again, she did not mention knowing Officer Barclift.

6. During voir dire, Juror Zinn demonstrated a strong desire to serve. She stated that she thought she was a "good juror" and chose to serve despite her employer's efforts to talk her out of serving. (RT 2107-08).

7. Juror Zinn's responses under oath to questions were misleading. She failed to provide the attorneys critical information; that she repeatedly had contact with one of the key witnesses in the case and that she regularly conversed with Officer Barclift over a period of months. Her less than candid answers, as well as her strong desire to serve, demonstrate bias on her part.

8. A juror who lies his way into the jury room is not really a juror at all: "The judge who examines on the *voir dire* is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only." *Clark v. United States,* 289 U.S. 1, 11 (1933). *Clark*

---

[29] The juror questionnaires as filled out by the prospective jurors who were not selected were not made part of the record. They have not been located by federal counsel and were not contained in the materials transmitted to federal counsel. Therefore, counsel cannot provide details about any juror's actual answers on the questionnaires.

held that a juror who obtains that position by committing fraud on the court is no more entitled to the privileges of that position than a stranger who sneaks into the jury room: "His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham." *Id; see also Dyer v. Calderon*, 151 F.3d 970, 983 (9th Cir. 1998).

9. The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror violated petitioner's right to a fair trial. *See, e.g., Dyer*, 151 F.3d at 973; *United States v. Hendrix,* 549 F.2d 1225, 1227 (9th Cir. 1977).

10. The voir dire in this case was fundamentally tainted, since the juror's answers did not disclose necessary information for trial counsel to assess impartiality. For voir dire to function, jurors must answer questions truthfully. *Dyer*, 151 F.3d at 973.

11. The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. *See United States v. Allsup,* 566 F.2d 68, 71 (9th Cir. 1977). Like a judge who is biased, (*see Tumey v. Ohio,* 273 U.S. 510, 535, 71 L. Ed. 749, 47 S. Ct. 437 (1927)), the presence of a biased juror introduces a structural defect not subject to harmless error analysis. *See generally Arizona v. Fulminante,* 499 U.S. 279, 307-10, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991); *see also Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998).

12. Here, the commissioner took inadequate efforts to remedy the misconduct:

> The trial court's efforts in this regard also violated petitioner's constitutional rights: Given the extremely delicate situation when a juror is suspected of prejudice or misconduct, the trial judge must assume the "primary obligation . . . to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial." *United States v. Boylan,* 898 F.2d 230, 258 (1st Cir. 1990). While a trial is ongoing, lawyers may not conduct the kind of aggressive investigation of jurors they would of other witnesses. In such circumstances the trial judge fulfills his duty only if he "erects, and employs, a suitable framework for investigating the allegation [of bias] and gauging its effects[.]" *Id.* Where juror misconduct or bias is credibly alleged, the trial judge cannot wait for defense counsel to spoon feed him every bit of information which would make out a case of juror bias; rather, the judge has an independent responsibility to satisfy himself that the

allegation of bias is unfounded.

Dyer, 151 F.3d at 978. The commissioner shirked his responsibility to provide a fair trial to Mr. Reno. Although the court stated "Based on that I'd excuse her, too, but I'd leave it up to you," ultimately the court allowed her to continue to serve after conducting a minor inquiry. The court had stated on the record that he felt she should be excused, but then did nothing about it. The court's failure to remedy Juror Zinn's misconduct further exacerbated the error.

13. The juror misconduct and the trial court's failures to correct that misconduct, violated petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

CLAIM 116: The Trial Court Was Partial in its Treatment of Potential Jurors During Jury Selection. The Jury Selected Was Biased in Favor of the Death Penalty and Violated Petitioner's Sixth and Fourteenth Amendment Rights to a Fair and Unbiased Jury.

1. During voir dire, prospective jurors who appeared biased in favor of the death penalty were treated differently than those who appeared to oppose it generally. The former were rehabilitated by the court. They were coaxed into giving responses neutral enough to survive defense challenges. The latter were summarily dismissed without any questioning by the court or counsel. (See, e.g., RT 575-578, 810-819). Often, when prospective jurors who appeared pro-death maintained their positions, despite attempts by the court at rehabilitation, defense counsel's challenges were still overruled.

2. Prospective juror Jack Brown said that he did not think the fact that petitioner was a homosexual would prevent him from being fair and impartial. The court asked what he meant by "you don't think so." (RT 896). Mr. Brown explained, "Well, I have a few little feelings along that line, not a whole lot, but it just – there's a little bit of a question there. It's not real strong, but–." (RT 896). The court asked, "Well, let's put it this way. If you have any opinions whether it's for or against homosexuality, can you put those aside and decide this case on the evidence that the prosecution and the defense give you and the

rulings of law that the court gives you." Mr. Brown responded, "I believe I could, sir." (RT 896).

3. Trial counsel informed Brown of the ages of the victims and asked "do you think because you have grandsons that are about that age that that might bias you against Mr. Memro in this case?" The juror responded that "It could have something, yes." Trial counsel asked Brown to explain. Mr. Brown said that if anyone hurt his grandsons he would be tempted to "break the law a little bit." (RT 897). Mr. Larkin asked if his feelings might make him "prejudiced or biased against Mr. Memro." The juror replied that "there could be a possibility." (RT 897). Trial counsel asked yet again, "If you were to find out, well, Mr. Memro's a homosexual, if you were to relate that to the age of the victims, also, in this case, because of those facts, just the age and Mr. Memro being a homosexual, do you think you might be biased against him?" The juror admitted that "I think that I possibly could be yes, sir." (RT 900).

4. The trial court stepped in to rehabilitate Mr. Brown:

> Those are factors that may or may not be brought to your attention in the penalty phase. That, I don't know. The point that's important is can you be fair in deciding the guilt or innocence of Mr. Memro knowing that he's charged with killing three small boys and knowing that he's a homosexual? Can you still say, I am fair and impartial in deciding his guilt or innocence?

(RT 900). Brown cautiously relented: "I think I could on that. I think I could be fair on that. I believe I could, sir. And I wouldn't guarantee it, but I think I could." The court said, "Well, there's no guarantees in life at any rate."

5. There are some guarantees. Petitioner is entitled to constitutional guarantees including his Sixth Amendment right to a fair and impartial jury. Trying petitioner in front of either a biased judge or a biased jury violated petitioner's Due Process guarantees under the Fifth and Fourteenth Amendments and his heightened capital case guarantees under the Eighth Amendment. It was the trial court's responsibility to ensure these guarantees.

6. The rephrased question posed by the court was confusing at best. He said that

the issues of homosexuality and the fact that the children were young, "may or may not" be raised in the penalty phase, and essentially reduced the question to whether or not the prospective juror was a fair person. Even so, Mr. Brown was still unsure. Trial counsel challenged for cause. The court overruled the challenge. (RT 903).

7. In contrast, jurors who voiced even a general opposition to the death penalty were not rehabilitated by the court. Rather, they were routinely dismissed. During voir dire, the court asked four standard questions regarding the opinion of prospective jurors on their feelings about the death penalty. Juror Elva Cazares gave equivocal responses to the questions. The court excused this juror on its own motion. (RT 1033). When asked whether she "would vote for something other than first degree murder so that [she] wouldn't even have to get the death penalty," she answered "Yes, I think I would." (RT 1032).

8. The court then tried to clarify the question:

> If the people prove beyond a reasonable doubt that the defendant is guilty of murder in the first degree and prove beyond a reasonable doubt that the truthfulness of the special circumstance alleged, would you refuse to vote for a verdict of the truthfulness of the special circumstance because of a conscientious opinion concerning the death penalty? In other words, regardless of the evidence that might be produced during the course of the trial and because of a conscientious opinion of the death penalty you would on every case automatically vote a verdict of false as to the special circumstance alleged because you know that such a verdict would end the death penalty question then and there.

(RT 1032-1033). To this, Ms. Cazares answered, "Well, it's kind of confusing in that term. But just to sum it all up, I don't believe in the death penalty." (RT 1033). The court never asked if she could set aside her beliefs and follow the law as instructed. Nor did the court ask if she could fairly determine a sentence, despite her feelings about the death penalty.

9. This unequal treatment of jurors was seen again with prospective juror Don Abeyta. Abeyta said that he was a strong supporter of the death penalty. (RT 558). He was affected by the age of the victims. He felt that anyone who killed children that young would

deserve the death penalty. Trial counsel asked: "If you found the facts to be true that Mr. Memro killed those individuals and you found the special circumstances true, then because of the age of the boys would you automatically vote for the death penalty?" Mr. Abeyta responded, "I'd have to say yes. They were young." (RT 561).

10. After the prosecution concluded its questioning, trial counsel challenged for cause. The court rephrased trial counsel's earlier question: "simply because of the age of the victims and regardless of the evidence you heard in the penalty phase, would you automatically vote for the death penalty?" Abeyta responded, "The way you put it now – you told me after mitigation and aggravation, I would have to listen to all the facts." The court affirmed the juror's response: "That's correct." (RT 576). The court permitted trial counsel to ask questions about that area only. Trial counsel asked, "Would you still lean towards the death penalty because of the age of the victims?" Abeyta responded, "I would say I would listen to all the facts, but I would have to, you know, sympathize in that way, yeah. I would have to go that way." Trial counsel asked again, "so due to the nature of the charges you would lean towards the death penalty?" Mr. Abeyta responded, "I'm more inclined to do so, yes." Trial counsel asked yet again, "Because of the age of the individuals would it be hard to change your mind from the death penalty?" Abeyta's answer did not waiver: "Again, I would say it would be. I would lean that way." (RT 577).

11. At one point during voir dire, trial counsel asked, "How long were you in the academy?" Since Mr. Abeyta said that he had graduated college from Cal State Long Beach, the implication was that he graduated from a police academy. Since the jury questionnaires from prospective jurors who were struck were not preserved, it is impossible to refer to the questionnaires to see what Mr. Abeyta was referring to. Law enforcement training was yet another reason the court should have sustained trial counsel's challenge.

12. Mr. Abeyta also admitted that he knew people close to him who had been victimized by crime. His father was mugged and his close friend was molested. (RT 568).

Despite these factors, the court denied trial counsel's challenge. (RT 578).

13. Prospective juror Julietta Lopez, like Ms. Cazares, responded that she did "not think" she would refuse to vote for guilt because of her conscientious objection to the death penalty. (RT 1540). She stated her concern that there had been no executions in California and that "the death penalty really doesn't mean that much any more." (RT 1540). She indicated that she would vote for life without parole; then, after asking the court to repeat its question concerning her voting for something other than first degree murder, she indicated that she would vote to avoid the death penalty. (RT 1542). The court immediately excused her on his own motion without asking further questions. (RT 1542).

14. A juror cannot be excluded simply because of a general objection to the death penalty. *Witherspoon v. Illinois,* 391 U.S. 510, 512 (1968). The proper standard is "whether the juror's views on the death penalty would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). Exclusion of a single juror in violation of this standard denies petitioner his right to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments.

15. Ms. Cazares stated her general opposition to the death penalty. She was equivocal in her response to the initial question of the court. The trial judge then presented a rambling and confusing "clarification" of his question. Cazares once again responded that the question was confusing and restated her general objection to the death penalty. The court then immediately excused her without any attempt to assist her in getting to the root of the confusion. This action amounted to an automatic exclusion of this juror based solely on her general objection to the death penalty. There was no showing that her duties as a juror would be "substantially impaired" by her beliefs on this issue.

16. Having gotten an equivocal response from Lopez, the court took no action to clarify the juror's responses and to determine if there was a substantial impairment of this

juror. The court failed to determine if either juror would follow the law as instructed. It was error to exclude her without further questioning. The failure to engage in adequate questioning was prejudicial, as it resulted in the seating of a biased jury. On at least two occasions during voir dire, the court did allow trial counsel to question the jurors even after they voiced an objection to the death penalty and the jurors rehabilitated themselves by clarifying their positions.

17. Juror Gerald Bradford said he would not vote for the death penalty. But then when the court followed up and asked if even if all the facts supported a verdict of death would he still refuse to vote for the death penalty. The juror said that he would vote for death in that situation and was ultimately passed for cause by both sides. (RT 820).

18. One juror who seemed emphatically opposed to the death penalty actually ended up being challenged by trial counsel as "auto-death" after additional questioning and was excused for cause. The court asked Juror Susan Aguirre if she would "vote for a verdict of false as to the special circumstances alleged because you know that such a verdict would end the death penalty question then and there." Ms. Aguirre answered "yes." (RT 660). The court asked twice more to confirm her answer, and each time she responded in the affirmative. The court next asked "would you in every case automatically vote for life imprisonment without possibility of parole and never vote for a verdict of death?" Ms. Aguirre responded that she would. The court asked again and again Ms. Aguirre responded that she would.

19. The court then allowed trial counsel to ask some questions. Larkin began, "In other words, you don't believe in the death penalty?" "No," Ms. Aguirre responded, "I don't." Larkin probed deeper, "So there are no circumstances wherein you would ever give the death penalty?" Ms. Aguirre again responded, "No." (RT 661). The court stepped in and explained the reasons for the questions. (RT 662). Ms. Aguirre, without any prompting from the court or from counsel, observed that "it isn't just one life we're talking about

here." The court said "three separate." To which Ms. Aguirre responded, "In all honesty, then I would ask for the death penalty." The court asked "regardless of what the defense offered?" Ms. Aguirre responded "yes." Larkin challenged for cause and the juror was excused. The court noted that either side could have been granted a challenge for cause, illustrating how perceptions of a jurors beliefs can change over the course of the voir dire. (RT 663).

20. Jurors Bradford and Aguirre demonstrate that just because a juror articulates a general opposition to the death penalty, that does not warrant exclusion without further evidence that the juror's duties would be impaired. There was no reason to believe that if given the chance, jurors Lopez and Cazares would not have rehabilitated themselves as well.

21. The court, through its own examination of the jurors, rehabilitated jurors who appeared to be auto-death. In contrast, when jurors appeared to oppose the death penalty, the court would summarily excuse them after making no inquiry into their beliefs whatsoever. The court demonstrated bias and helped the prosecution assemble a jury panel biased in favor of the death penalty. The actions of the trial court thus denied petitioner an impartial jury as guaranteed by the Sixth and Fourteenth Amendments.

CLAIM 117: Informing The Jury That There Had Been a Previous Trial Violated Petitioner's Right to a Fair Trial.

1. At various times, the prosecution and the trial court both indicated to the jury that there had been a prior trial. Conveying this information to the jury unconstitutionally tainted the jury's verdict by lessening the jury's appreciation of the critical nature of their decision making process.

2. The prosecution called Officer Donald Barclift of the Bell Gardens Police Department to testify. Officer Barclift described the crime scene at Ford Park, the site of the 1976 killings. He identified photographs which were circulated among the jurors. The court interrupted and asked, "Mr. Millett, excuse me for a second. Ladies and Gentlemen,

at the time you looked at any of the pictures, any of you look at the backs of the picture? . . . Did you notice anything back there?" One juror said she had looked at the back of the pictures but only noticed the exhibit number. (RT 2357).

3. After the witness and jury were excused, the court addressed the parties: "Gentlemen, I noted on the exhibits that the original trial date appears. It doesn't seem to have caused a problem at the present point, but it could in the future. Therefore, I'm going to have the clerk tape over all the previous identification except for the ones in this trial." (RT 2365).

4. Subsequently, trial counsel cross-examined Detective Lloyd Carter of the South Gate Police Department. During the examination, counsel referenced a particular page:

Mr. Larkin: Page 863 of the transcript dated April 10.

Mr. Millett: This is 1979?

Mr. Larkin: No, '86 –'87.

(RT 2487). Since the second trial did not commence until 1987, the reference to 1979 was tantamount to telling the jury that there had been a prior trial eight years previously.

5. Petitioner contested guilt on Counts 1 and 2. (RT 2827). Petitioner also contested the first degree murder charge on Counts 2 and 3. The indication that there had been a prior trial, and thus, convictions on the charges, completely undermined petitioner's defense, just as it undermined trial counsel's credibility for presenting a defense of not guilty.

6. These errors were exacerbated by the court's instruction to the jury that Count 1 was second degree murder as a matter of law, for reasons about which they were not to speculate. This instruction focused the jury on the issue without giving any explanation. It could only lead to speculation. The knowledge that there had been a prior conviction poisoned the objectivity of the jury as surely as if the jurors had knowledge of

the case and conviction from the media.

7. One of the jurors had heard about petitioner's case before the trial. (Juror Questionnaire of Elizabeth Ann Burns, Pg. 8). The prejudice of her knowledge was compounded by the disclosures of the previous trial. Juror Burns not only knew of the case from extra-judicial sources but then also learned that there had been a prior conviction. Her legal training ensured that the jurors knew that a retrial meant there had been a conviction.

8. The Sixth Amendment guarantees to all criminal defendants including, through the Fourteenth Amendment, defendants before state courts, (*see Duncan v. Louisiana*, 391 U.S. 145, 147-49 (1968)), the right to "a speedy and public trial, by an impartial jury. . . ." U.S. Const. Amend. VI. Where a juror has become aware through extrajudicial sources that the defendant has a prior criminal record, the established practice is that that juror is presumed to be prejudiced and should be excused. *See, e.g., Marshall v. United States*, 360 U.S. 310 (1959).

9. The error here was even more pronounced. The jury was made aware that petitioner had prior criminal convictions on those precise charges. This knowledge did not require inferences deduced from a prior criminal record – that if a defendant did this before, he likely will do it again. No inference was required – instead, the jury could conclude he was guilty because he had already been found guilty.

10. A juror uncertain of his vote would likely be swayed by the knowledge that another jury had previously resolved the identical issue adversely to defendant. *Romano v. Oklahoma*, 512 U.S. 1 (1994). The Supreme Court has held that the jury must not be misled regarding the role it plays in the sentencing decision. *Caldwell v. Mississippi*, 472 U.S. 336 (1985) (plurality opinion); *Id.*, at 341-342 (O'Connor, J., concurring in part and concurring in judgment). The jury could not help but be misled about the importance of its role when it was told that petitioner had already been convicted.

11. The trial court never instructed the jury to disregard the prosecutor's comments. The court was complicit in conveying this information to the jury. The court allowed the jury to view exhibits with information from the prior trial and gave no instruction regarding this error.

12. The jury was informed that petitioner had previously been tried for the same crimes. It is reasonably likely that the jurors concluded that he had been previously convicted and sentenced to death for those crimes, since the prosecutor was now seeking convictions and a death sentence again. This knowledge had the natural tendency to lessen the jury's understanding of the import of its decision. Any doubt in the jurors' minds was eased by the knowledge that a prior trial had already ended in a conviction and a death sentence.

13. These errors were prejudicial in both the guilt and penalty phases. The defense contested petitioner's guilt on Counts 1 and 2 (the 1976 killings). Trial counsel conceded petitioner's guilt on Count 3 without petitioner's consent and over petitioner's specific objection, but argued that petitioner was guilty of a lesser offense. If the jury found petitioner guilty of second degree murder on Count 3, petitioner would have avoided a penalty phase. The knowledge that petitioner had been previously convicted on these charges severely undercut the defense.

14. The defense also relied in part on the concept of lingering doubt in the penalty phase. Knowledge of the prior conviction and sentence unfairly prejudiced the jurors against this defense. Lingering doubt is doubt less than a reasonable doubt. It is, however, a valid defense in the penalty phase. *People v. Cox* 53 Cal. 3d 618 (1991).

15. The defense also argued that a life sentence was appropriate based on the limited social history evidence presented in the penalty phase. Knowledge of the prior death sentence eviscerated any impartiality the jury may have had. It also lessened the jury's sense of responsibility for their penalty phase decision. *See, e.g., Caldwell.*

16. The discovery that there had been a previous trial violated petitioner's right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

I. CLAIMS RELATING TO MENTAL DEFENSES.

CLAIM 118: Petitioner was Mentally Incompetent to Waive Any of his Rights at the Time of his Arrest and Confession.

1. As a result of the mental condition described by Dr. George W. Woods (Exhibit CC), petitioner was not competent to waive any rights with respect to his arrest and confession and did not knowingly and intelligently waive such rights. See also Claim 118.

2. As a result of the above, petitioner was denied a fair trial and a reliable determination of guilt and penalty.

CLAIM 119: Petitioner was Mentally Incompetent to Stand Trial.

1. Petitioner had extremely poor relations with his attorneys at trial and virtually no communication with them.

2. As a result of the mental condition described by Dr. George W. Woods (Exhibit CC), petitioner was unable to participate in his defense in a rational manner.

3. Had a reasonable investigation and inquiry been made either by the trial court or trial counsel, petitioner's incompetence would have become known. There were sufficient facts known to both the court and counsel to require such inquiry and investigation.

4. Trial of a mentally incompetent person such as petitioner violates the right to due process within the meaning of the Fourteenth Amendment. It also produces violations of the host of trial rights protected by the Sixth and Fourteenth Amendments, including the rights to a fair trial, to present a defense, to compulsory process, to confrontation and to the assistance of counsel. In a capital case such as this, it further violates the protections of the Eighth and Fourteenth Amendments, including the rights to a reliable, accurate, non-arbitrary determination of capital murder and the appropriate

punishment. *Drope v. Missouri,* 420 U.S. at 172, 181; *Pate v. Robinson,* 383 U.S. at 387; *Odle v. Woodford,* 238 F.3d 1084 (9th Cir. 2001).

5. Petitioner was deprived of his right to put on a defense because he was tried while incompetent. *Crane v. Kentucky,* 476 U.S. at 690.

6. Petitioner also was deprived of his foregoing constitutional rights through the violation of his constitutional right to be present at trial, (*Snyder v. Massachusetts*, 291 U.S. 97, 107-108 (1934)), and the related state statutory rights, per Penal Code §1043, because his mental incapacity rendered him mentally "not present," and per §1368, defining the procedure for determination of competency when a doubt arises.

7. The state statutory violations also give rise to Fifth and Fourteenth Amendment liberty and due process interest violations. *See Hicks v. Oklahoma,* 447 U.S. at 346-347.

8. During the penalty phase, petitioner demonstrated his inability to participate with his defense in a rational manner, when he demanded to make a statement. The statement he made was:

> While I do not concede the truth, accuracy or correctness of the jury's verdicts, I do feel that since the jury has determined the verdicts of guilt and the maximum degree possible on all counts and the special circumstances, that they should also now return with a verdict of death as the appropriate penalty.

(RT 2961).

9. The Court noted that the statement did nothing to assist or further his case. Petitioner responded "Yes, it does." (RT 2961). He explained: "There are a number of reasons why I prefer the death penalty at this point." (RT 2961). When the trial court initially stated it would not allow the statement, petitioner offered to request to go pro per so he could make the statement. (RT 2961-62).

10. The trial court recognized that petitioner was mentally ill and seeking what amounted to judicial suicide:

> I don't know that there's any authority that says that the defendant can thwart the judicial system by standing up and saying, "I want death, ladies and gentlemen of the jury," and in essence turn this into a travesty. I for one will not be a party to it if the People – if that's the People's position. . . . Mr. Memro, I realize to you we are all your enemies. That's fine. Your own paranoia is something you'll have to deal with . . .

(RT 2963). After a recess, the trial court explained "What we have here, though, is the court participating so to speak in judicial suicide." (RT 2964). After trial counsel expressed objection, the trial court commented "Maybe there's a method in his madness." (RT 2966).

11. Petitioner's suicidal impulses were demonstrated by trial counsel's statement to the Court regarding petitioner's thoughts about the penalty phase presentation:

> Mr. Memro has been trying to keep me from calling any witnesses that might help him in the penalty phase. He attempted on two different occasions to dissuade the last witness that we had on the stand from testifying. He tried to get her to leave, tried to get her not to testify. And no he's coming– now that she testified he now says that he wants to make the statement to the jury. Until he did tell the court today, he had mentioned the statement but had never said he was going to do it.

(RT 2966-67). The Court explained:

> It just seems to me that we're participating in judicial suicide, and I find that very offensive.

(RT 2967).

12. These events put the trial court on notice that petitioner was suicidal, as the court itself acknowledged. Having recognized his suicidal nature, as well as his paranoia, the trial court was obligated to inquire into petitioner's competence. Naturally, any evidence regarding suicide ideation or attempts is strong evidence of mental illness, oftentimes reaching incompetency. *United States v. Loyola-Dominguiez*, 125 F.3d 1315, 1318-1319 (9th Cir. 1997).

13. At a minimum, the Court was obligated to conduct a competency determination and initiate competency proceedings *sua sponte*:

> [W]hen a "doubt" arises in the mind of the trial judge regarding defendant's present

> sanity or competence to stand trial, it becomes his duty to certify the defendant for a sanity hearing; the matter is jurisdictional and cannot be waived by defendant or his counsel.

In Re Davis, 8 Cal.3d 798, 808 (1973), *citing*, *inter alia, Robinson v. Pate,* 383 U.S. at 384.

14. As held by this Court, in *People v. Hale*, 44 Cal.3d 531, 538-539 (1988), the failure to hold a competency hearing following the court's explicit expression of doubt as to defendant's competency and its subsequent order requiring a competency hearing, is error and cannot be cured by a retrospective appellate determination of probable competence to stand trial. In addition to petitioner's federal constitutional right not to be tried while incompetent, he had the state-created rights as discussed herein. To the extent that these rights were denied him, petitioner's right to a state-created liberty interest were arbitrarily violated, which constitutes a Due Process violation. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Hicks v. Oklahoma,* 447 U.S. 343 (1980). Any

> . . . *sub silentio* disposition of the section 1368 proceedings without a full competency hearing rendered the subsequent trial proceedings void because the court had been divested of jurisdiction to proceed pending express determination of the competency issue.

Id., at 541.

15. There were no sound tactical reasons for the failures of counsel regarding competency issues. Counsels' performance fell below any objective standard of reasonableness under prevailing professional norms. Moreover, each such failure subjected petitioner to prejudice, *i.e.*, there is a reasonable probability that, but for each such failing by counsel, the trial's result would have been more favorable to petitioner, at both the guilt and penalty phases.

16. Trial counsel's failure to adequately investigate or timely express a doubt as to competency, failure to present supporting evidence and withdrawal or abandonment of competency proceedings, violated petitioner's Sixth Amendment right to effective

assistance of counsel and petitioner's Fifth, Sixth and Fourteenth Amendment rights to liberty, fair trial, present a defense, be present at trial, confront witnesses, due process, and the right to heightened capital case due process under the Eighth and Fourteenth Amendments, and also violated the subsidiary right to reliable capital case sentencing, and the related state statutory rights, per Penal Code §1043, because his mental incapacity rendered him mentally "not present," and §1368, defining the procedure for determination of competency when a doubt arises.

17. The state statutory violations also give rise to Fifth and Fourteenth Amendment liberty and due process interest violations. *See Hicks v. Oklahoma,* 447 U.S. at 346-347. Each of these state and federal constitutional rights were violated, and the conviction and sentence are void. *See e.g., Hicks v. Oklahoma,* 447 U.S. at 346-347; *Drope v. Missouri,* 420 U.S. at 172, 181; *Pate v. Robinson*, 383 U.S. at 384, 387; *Crane v. Kentucky,* 476 U.S. at 690; *Duncan v. Louisiana,* 391 U.S. at 147-158; *Strickland v. Washington,* 466 U.S. at 694; *Coy v. Iowa,* 487 U.S. at 1015-1020; *Ake v. Oklahoma,* 470 U.S. at 83; *Woodson v. North Carolina,* 428 U.S. at 304; *People v. Mayes,* 202 Cal.App.3d at 915; *In Re Davis,* 8 Cal.3d at 808; *People v. Hale,* 44 Cal.3d at 538-539.

18. A client's mental illness and mental incompetency place an even greater obligation on trial counsel to ascertain the details of the mental illness, how it effects the client's mental functioning and competency to proceed, seek further expert evaluation, express a doubt as to competency and otherwise represent the defendant properly in view of such factors, particularly in a capital trial. *Blanco v. Singletary,* 943 F.2d 1477, 1502 (11th Cir. 1991); *Thompson v. Wainwright*, 787 F.2d 14447, 1451 (11th Cir. 1986).

19. As a result of the above, petitioner was denied his rights to notice, due process, liberty, fair trial, unbiased jury, jury trial, effective assistance of counsel, heightened capital case due process, reliable and reviewable guilt determination, individualized, reliable and reviewable penalty determination, fairness in capital case

sentencing, the prohibition against cruel and unusual punishments and the prohibition against death-biased proceedings, all constituting arbitrary and unreasonable decision making in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

CLAIM 120: Petitioner Was Deprived of His Right of Access to and Assistance of Competent Mental Health Experts, in Violation of *Ake v. Oklahoma.*

1. Petitioner was deprived of his right of access to, and assistance of, effective mental health experts, *Ake v. Oklahoma,* 470 U.S. 68, 83 (1985), in violation of his rights to notice, due process, liberty, fair trial, unbiased jury, jury trial, effective assistance of counsel, heightened capital case due process, reliable and reviewable guilt determination, individualized, reliable and reviewable penalty determination, fairness in capital case sentencing, the prohibition against cruel and unusual punishments and the prohibition against death-biased proceedings, all constituting arbitrary and unreasonable decision making in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *See e.g., Ake v. Oklahoma,* 470 U.S. at 83; *Hicks v. Oklahoma,* 447 U.S. at 346-347; *Crane v. Kentucky,* 476 U.S. at 690; *Duncan v. Louisiana,* 391 U.S. at 147-158; *Strickland v. Washington,* 466 U.S. at 694; *Woodson v. North Carolina,* 428 U.S. at 304; *Pate v. Robinson,* 383 U.S. at 387; *Drope v. Missouri,* 420 U.S. at 172, 181.

2. A defendant in a capital case has a federal constitutional due process right to "... access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense..." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

3. Violation of the foregoing guarantees inevitably results in numerous other constitutional errors. Infringement of the *Ake* right also violates the Sixth Amendment right to effective assistance of counsel, because the former violation makes it impossible for trial counsel to perform consistent with the Sixth Amendment standard, per *Strickland v. Washington,* 466 U.S. at 694. Additionally, evidence of mental illness is relevant to a

number of fundamental issues arising throughout the trial process. It is relevant to trial competency; evidence of mental illness, or mental conditions short of illness. It may also be relevant to guilt phase mental state issues, such as sanity at the time of the crimes, intent to kill, diminished capacity (at the time of petitioner's trial), imperfect self-defense, etc., and can also be relevant to three of California's penalty phase statutory factors in mitigation, per §190.3, subdivisions (d) extreme mental disturbance, (h) capacity impaired by mental disease or defect, and (k) any extenuating circumstance. Therefore, a constitutional violation under *Ake* can, and here did, give rise to additional constitutional violations of all of the constitutional guarantees set forth, *ante*.

4. Prior to and during petitioner's trial of this matter, his attorneys were aware, or should have been aware, of many of petitioner's past and current displays of symptoms of mental illness, treatments for mental illness, his related life history, related family history and risk factors for mental illness. These manifestations and factors were consistent with various serious mental diseases or disorders, including but not limited to all those described elsewhere in this petition.

5. Trial counsel's failure to adequately provide available information to the mental health experts, to investigate matters relevant to petitioner's mental health, failure to recognize the inadequacies in the evaluations they received, failure to consult with other mental health experts, and failure to raise petitioner's incompetency or assert other mental health related defenses, violated petitioner's Sixth Amendment right to effective assistance of counsel and petitioner's Fifth, Eighth and Fourteenth Amendment rights to due process and heightened capital case due process, per the authorities cited *infra, ante*.

6. The failures of counsel were without a sound tactical reason, counsels' performance thus fell below any objective standard of reasonableness under prevailing professional norms.

7. Each of the foregoing constitutional guarantees was violated by the matters

described here, prejudicing petitioner and mandating reversal.

8. Dr. K. Karols and Dr. John Stalberg were appointed by the court to examine petitioner in 1979. They failed to provide counsel with a responsible and accurate evaluation of petitioner, in that, *inter alia,* they conducted only two abbreviated jail meetings with petitioner which were inadequate to allow any meaningful mental health evaluation and properly evaluate Mr. Reno. The only other information source the doctors considered was the preliminary hearing transcript of November 13, 1978.

9. The doctors failed to meaningfully observe petitioner, obtain an adequate social history,[30] order or perform full and appropriate testing.[31] They did not conduct any

---

[30] Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of behavior," R. Strub & F. Blac, *Organic Brain Syndromes* (1981) at 42, an accurate and complete medical and social history has often been called the "single most valuable element to help the clinician reach an accurate diagnosis." Kaplan & Sadock, *Comprehensive Textbook Of Psychiatry/VI* (Williams & Wilkins 1995) at 837.

It is well recognized that the patient is often an unreliable and incomplete data source for his own medical and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan & Sadock, at 884. Accordingly, "retrospective falsification, in which the patient changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." *Id.* Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon sources other than the defendant.

Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed-Speculation*, 66 Va. L. Rev. 4237 (1980); accord *Report of the Task Force on the Role of Psychiatry in the Sentencing Process,* Issues in Forensic Psychiatry, 202 (1984); Pollack,

interviews of other persons, let alone comprehensive interviews sufficient to discover petitioner's full mental disease and defect.

10. Dr. Karols and Dr. Stalberg failed to meet the standard of care required by their own profession and failed to perform as competent psychiatrists, in rendering their opinions of petitioner's mental state. Had they met their profession's minimally required standard of care, they would have reached the conclusions that: (1) petitioner was not competent to proceed to a capital trial and (2) petitioner lacked the capacity to premeditate, deliberate and form malice.

11. The doctors and/or their associates and agents, did not provide a proper mental evaluation of petitioner. They either did not know about or failed to determine that petitioner suffered from mental disorders. In fact, they diagnosed petitioner as having no psychosis or significant neuroses. Had trial counsel provided adequate information to the experts and had the experts met a reasonable standard of care, the experts would have reached the conclusions of Dr. George Woods– namely, that petitioner suffers from Borderline Personality Disorder and Post Traumatic Stress Disorder. See Exhibit CC.

12. Dr. Alfred Coodley was also appointed on petitioner's behalf. Dr. Coodley failed to properly evaluate petitioner because he conducted a single brief jail meeting with petitioner and reviewed the preliminary hearing transcript of November 13, 1978.

13. Dr. Coodley relied on the inadequate social history provided by petitioner. As all patients do, petitioner painted a minimalist view of his family life, stating only that he never got along with his family. He never discussed the mental illnesses suffered by his

---

Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davison, *Forensic Psychiatry* 38-39 (2d ed. 1965).

[31] For example, they did not test for organic brain damage, or any other disorder, nor did he conduct a comprehensive neuropsychological examination. The limitations within which they operated as the evaluating mental health professional severely compromised the integrity of his findings.

mother and her extreme lack of affection for her children and its attendant effects on them.

14. Dr. Coodley also was not told about petitioner's father's severe alcoholism and his violent behavior toward everyone in his family, especially petitioner. Dr. Coodley was never told of the harsh beatings petitioner received from his father. Without this information, an adequate diagnosis and opinion was not possible. See Exhibit AA, Declaration of Gretchen White.

15. Dr. Coodley and/or his associates and agents, did not provide counsel with a proper evaluation of petitioner. He either did not know about or failed to determine that petitioner suffered from additional mental disorders, including Borderline Personality Disorder and Post Traumatic Stress Disorder.

16. Dr. Coodley made several other observations. Although it was requested, trial counsel failed to follow up with further investigation or provide additional available factual information. Dr. Coodley found that petitioner manifested paranoid trends. He observed that petitioner's ability to conform his conduct to the requirements of law was somewhat impaired. He found that petitioner's ability to deliberate, premeditate and harbor malice were diminished at the time of the offense. Trial counsel did not provide additional evidence regarding petitioner's history of emotional behavior which would have further supported these findings.

17. Dr. Edward Connelly, a licensed psychologist, administered psychological tests to petitioner. Dr. Conolley found it likely that petitioner had decompensated into a borderline pattern of a schizoid personality disorder with accompanying social competence deficits and periodic psychotic episodes. Dr. Conolley stated that more extensive psychodiagnostic assessment was required to render a firm diagnosis. Counsel never provided such evidence to Dr. Conolley, despite its existence.

18. Dr. Michael Coburn was also appointed on petitioner's behalf. He failed to provide a proper evaluation of petitioner. He conducted only three brief jail meetings with

petitioner, and reviewed the preliminary hearing transcript of November 13, 1978 and Dr. Conolley's testing.

19. Dr. Coburn also relied on the inadequate social history provided by petitioner. As mentioned above, and as all patients do, petitioner painted a minimalist view of his family life, stating only that he never got along with his family. He never discussed the mental illnesses suffered by his mother and her extreme lack of affection for her children and its attendant effects on them.

20. Dr. Coburn also was not told about petitioner's father's severe alcoholism and his violent behavior toward everyone in his family, especially petitioner. Dr. Coburn was never told of the harsh beatings petitioner received from his father. Without this information, an adequate diagnosis and opinion was not possible. See Exhibit AA, Declaration of Gretchen White.

21. Dr. Coburn did not know about or failed to determine that petitioner suffered from additional mental disorders, including Borderline Personality Disorder and Post Traumatic Stress Disorder. Because Dr. Coburn did not have the required information, he misdiagnosed petitioner as having a severe personality disorder of homosexual pedophilia, as well as characteristics of an explosive personality. With this limited information, Dr. Coburn found that petitioner may have lacked the ability to premeditate and deliberate or harbor malice. Yet, counsel failed to follow up on this critical opinion.

22. Trial counsel rendered ineffective assistance in failing to utilize psychological evaluations of petitioner, which were conducted while petitioner was at San Quentin following the first trial. These evaluations documented signs of both paranoid and schizophrenic thinking. He was diagnosed with schizophrenia, residual type. An additional diagnosis was Dissociative Reaction. Trial counsel should have provided this information to all the defense experts.

23. Counsel also failed to ensure that mental health experts had necessary

information in order to adequately examine and diagnose petitioner. Reports from petitioner's hospitalization at Atascadero in the early 1970's were available. These would have provided critical information regarding petitioner's mental condition. These reports would have been sought by reasonable mental health experts. The reports stated that petitioner had a sense of being attacked and had over-learned the response to attacks of attacking back. The reports also noted his history of severe lifelong headaches. They also documented physical abuse at his parents' hands.

24. Counsel also failed to inform his experts of Dr. Harold Deering's report to Judge McGinley regarding the David Schroeder incident in 1972. In that report, Dr Deering noted petitioner's severe reactions to a blow to the face and that petitioner tended to respond by reflex action. The psychiatric diagnosis was paranoid personality. Competent medical experts would have required reports like this one in forming an adequate diagnosis of petitioner.

25. Trial counsel failed to obtain and thus the mental health experts failed to consider, petitioner's records from his confinement in Atascadero State Mental Hospital. These records show brain abnormalities visible on an E.E.G., and cite as a potential cause a 1965 motorcycle accident. These are the type of records which reasonable experts would have considered and the resulting opinions rendered by experts were accordingly flawed.

26. These failures were obviously prejudicial to petitioner. At petitioner's first trial, counsel presented a mental state defense. Because of the errors discussed herein, however, that mental state defense was unsuccessful. Had trial counsel rendered effective assistance and had the mental health experts used a reasonable standard of care, it is reasonably likely that petitioner would not have been convicted of first-degree murder in Count 3, and thus petitioner would not have been death eligible. Pursuant to Double Jeopardy principles, petitioner thus would not have been death-eligible in the second trial.

27. At the second trial, trial counsel conceded that petitioner was the killer in

Count 3, but contested guilt on Counts 1 and 2. Counsel did so despite the wealth of evidence of mental disease as detailed herein. This evidence would have powerfully undercut the assertion that any of the crimes were first-degree.

28. Trial counsel also failed to use this evidence during the penalty phase of the second trial. Fully-informed opinions rendered by thoroughly prepared mental health experts would have been powerful evidence in mitigation. Trial counsel presented no mental health experts at the penalty phase at all. Instead, trial counsel presented a single witness, petitioner's sister, who tended to minimize petitioner's woeful social history, as well as his lengthy history of mental illness about which she was largely ignorant.

29. Because of the failures discussed herein, mental health experts failed to discover that petitioner was incompetent to stand trial.

30. Counsel failed to provide the mental health experts with that level of information which was or should have been known or readily available to them, that would have been provided by any reasonably competent defense attorney with or without a request for additional information. Any reasonably competent attorney would have known that these doctors could not render a proper opinion on the information given.

31. The failure to exercise reasonable diligence to produce exculpatory or mitigating evidence, the failure to present it to the relevant fact-finder and the decision to employ faulty strategy resulting from lack of diligence in preparation and investigation are not protected by the presumption in favor of counsel. Failing to interview witnesses or discover exculpatory or mitigating evidence relates to trial preparation and not trial strategy, thus failure to locate or present such evidence is ineffective assistance, *Kenley v. Armontrout,* 937 F.2d at 1304, whether the evidence involves the defendant's mental health reports, *id.*, or the defendant's mental and social history.

32. The inadequacies in the mental health professionals' evaluations were so patent that they would have been recognized by any reasonably effective capital case

defense counsel. Given the social history information available to them, counsels' reliance on those evaluations, failure to perceive the inadequacies in those evaluations, failure to seek a separate evaluation from another mental health expert and resulting failure to assert petitioner's incompetency, or raise other mental health related defenses, such as claims bearing upon intent, and present penalty phase evidence in mitigation, amounted to ineffective assistance of counsel, in violation of the Sixth, Eighth and Fourteenth Amendments. *Wiggins*, 539 U.S. 510, 123 S. Ct. 2527, 2536-2537.

33. Trial counsel either had documentation of all the matters alleged elsewhere in this petition concerning petitioner and all information bearing upon his mental illness, or that information was readily available to them. They presented inadequate information, failed to investigate such matters, failed to present such information to the mental health experts and failed to use the appropriate information in formulating their own trial strategy at both guilt and penalty phases.

I. OTHER CLAIMS.

1. GUILT PHASE.

CLAIM 121: Petitioner was Deprived of a Fair and Accurate Guilt and Penalty Phase due to Lack of Available Material Evidence.

1. Petitioner's conviction, special circumstance findings and sentence of death are illegal and were unconstitutionally obtained in violation of his Sixth, Eighth and Fourteenth Amendment rights to a fair trial, to the effective assistance of counsel, to a reliable and accurate determination of guilt and sentence of death, and to due process of law, as a result of: (a) absence of a complete psychiatric evaluation of petitioner; (b) absence of evidence of the timing of the alleged lewd and lascivious act; (c) lack of investigation regarding the testimony of Jose Feliciano; (d) absence of readily available evidence that petitioner would not voluntarily consent to the search and provide a statement to the police; (e) absence of evidence that another person or persons other than defendant

were responsible for the Bell Gardens killings; (f) lack of evidence or instruction upon which the jury could have considered the voluntariness of the confessions; (g) denial of petitioner's statutory and constitutional right to a speedy trial; (h) lack of a timely request for a lingering doubt instruction.

2. Petitioner's rights were also violated by the absence of a complete psychiatric evaluation of petitioner and the absence of evidence of the timing of the alleged lewd and lascivious act.

3. Trial counsel failed to conduct an investigation regarding the testimony of Jose Feliciano.

4. Trial counsel knew that Jose Feliciano, an eyewitness at the scene of the Bell Gardens killings, had been hypnotized and therefore his testimony would be inadmissible under the case of *People v. Shirley*, 31 Cal.3d 18 (1982). Despite the absolute ability to keep this testimony from the jury, trial counsel, as a result of a lack of discovery materials by the South Gate Police Department and intentional trickery by witness Feliciano, waived his objection without adequately investigating whether Feliciano would identify petitioner as being in the park around the time of the killings.

5. Trial counsel did not have an investigator interview Feliciano prior to making the decision to waive his objection and trial counsel did not have an investigator present when trial counsel interviewed the witness prior to his testimony. As a consequence, when Feliciano changed his story on the stand, petitioner (whose attorney was in the conflicted position of both attorney and essential witness) could not present "prior inconsistent statement" testimony. At the time of petitioner's trial, Feliciano was in custody. Trial counsel did not investigate whether Feliciano received any benefit from the prosecution for his testimony identifying petitioner.

6. On trial counsel's representation that Feliciano said he could not and would not identify petitioner as being at the park, petitioner waived his *Shirley* objection.

Feliciano then did identify petitioner as looking like the person he saw at the park with the victims shortly before their death. Trial counsel did not impeach Feliciano's testimony and did not advise petitioner of the conflict between counsel's role as a witness and his duty as petitioner's counsel.

7. Feliciano was the only witness to identify petitioner as being even near the crime scene. There was no tactical reason for not investigating and interviewing the witness with an investigator present. As a result, petitioner was prevented from making an informed choice regarding the waiver of the *Shirley* objection. Because no investigator was present when trial counsel interviewed Feliciano, petitioner was denied effective conflict-free representation and the opportunity to call trial counsel as a witness or otherwise impeach Feliciano's testimony.

8. Reasonably adequate investigation of Feliciano's testimony and the proper use of an investigator would have produced a more favorable result at the guilt and penalty phase. (See, e.g., Exhibit M, Declaration of Jose Feliciano).

9. The lack of adequate investigation, the failure to use an investigator to interview Feliciano and the lack of a basis for an informed decision on the *Shirley* issue deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

10. Petitioner's rights were also violated by the absence of evidence which would demonstrate that it was unlikely that petitioner would voluntarily confess to the police or consent to a search of his residence.

11. Trial counsel reasonably should have known of the reports that petitioner had a particularly low pain threshold and was especially fearful of physical attack and threats.

12. In addition, evidence readily available through family members, friends and law enforcement agents in and near petitioner's home towns of Lansing and Holt, Michigan, would have shown that petitioner had an antipathy to the police and a history of refusing to voluntarily comply with police requests.

13. Presentation of this information to the court during the hearing to suppress the confession would have supported petitioner's credibility through independent evidence that he was coerced into talking with the police and/or allowing them to search his residence.

14. Since the trial court found that he believed the officers' version of the interrogation, this independent corroborative evidence of petitioner's testimony would have led to a more favorable result in the suppression of the confession and the fruits of the search, thereby leading to a more favorable result in the guilt phase of the trial.

15. Trial counsel's not obtaining and presenting reasonably available corroborative evidence deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

16. Petitioner's rights were violated by the prosecution'swithholding of evidence that a person or persons other than petitioner were responsible for the Bell Gardens killings.

17. Trial counsel knew that petitioner had apparently been ruled out as a suspect in the Bell Gardens killings which occurred in 1976, two years before petitioner's arrest for the Carter killing in 1978. Second, trial counsel were eventually provided long withheld discovery indicating that numerous suspects had been questioned and even arrested by the Bell Gardens police for the two killings in the years before petitioner was arrested. At least one suspect had confessed to the crimes (Bell Gardens Police Reports re Counts I and II, discovery not provided to petitioner until 1986, even though ordered in 1979, Exhibit S-A).

18. Second trial counsel failed to adequately investigate or present the strong evidence indicating third-party culpability for the Bell Gardens killings. Because of the failure to investigate this evidence, trial counsel failed to present any evidence to the jury that a third party was responsible for the Bell Gardens killings, even though trial counsel

argued that petitioner was not responsible for these killings.

19. Just prior to the second guilt phase trial, an assistant to trial counsel viewed a previously withheld photograph of a suspect, Charles Lohman, which was identical to the composite drawing and eyewitness descriptions of the man seen at the crime scene just prior to the killings. This same person having been identified by at least two separate witnesses as having been at the park with the victims. No copy was made of this photograph and it was "lost" by the prosecution or police before petitioner's trial and was unavailable to petitioner at the time of his second trial.

20. Had trial counsel investigated and presented evidence of third-party culpability, there would have been a more favorable result in the guilt phase. The prejudice to petitioner is illustrated by Exhibits G and H. There was no physical evidence connecting petitioner to the Bell Gardens incident. Petitioner's confession, even if admissible, was affected by the promises and coercive tactics of the police interrogators and thereby could have been challenged before the jury.

21. The failure to investigate and present evidence of third party culpability for the Bell Gardens killings deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

22. Petitioner's rights were violated by the failure to provide the jury with evidence or instruction which would have allowed them to consider the voluntariness of the confessions.

23. Prior to trial, defense counsel moved the court for an order suppressing petitioner's confession. That motion was denied by the court.

24. Despite the strong evidence that the confession was elicited by threats and both physical and psychological coercion, defense counsel failed to present the evidence of this coercion before the jury. Defense counsel had evidence of the coercive tactics of the police interrogators from independent witnesses and did not need to have petitioner testify

in order to elicit testimony on the coercive police practices. These witnesses either testified at the hearing on the motion to suppress the confession or the transcript of their prior testimony at the first trial was admitted at that hearing. In addition, as part of his offer of proof, defense counsel at the first trial specifically identified and summarized the sum and substance of the testimony of more than 20 witnesses concerning incidents of coercive interrogation practices of South Gate Police Department.

25. This evidence was admissible at trial under Evidence Code § 406 for the purposes of challenging the weight and credibility of the confession itself and had been held admissible and relevant by this Court in *Memro I.* Defense counsel did not have a reasonable tactical basis for not challenging the circumstances of the confession in front of the jury other than the perjurious testimony of Anthony Cornejo and other illegal informants. The absence of this evidence that was relevant to support the defense theory that petitioner's confession was not true effectively denied petitioner the right to bring relevant evidence before the jury and to present a meritorious defense.

26. Trial counsel also failed to introduce any testimony regarding the destruction of the citizen complaint reports before the jury. This testimony was also admissible as to the weight and credibility of the officers' testimony regarding the confession.

27. If this evidence had been introduced by trial counsel, there would have been a more favorable result in the guilt and penalty phase. There was no physical evidence connecting petitioner to the Bell Gardens incident. Other suspects had been arrested for these offenses and at least one had even confessed to the killings. The circumstances of petitioner's confession were thus critical to the question of guilt, especially in light of the existence of another person's confession.

28. Trial counsel's failure to challenge the voluntariness of the confession before the jury deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

29. Petitioner was deprived of his statutory and constitutional right to a speedy

trial.

30. Petitioner's rights were also violated by trial counsel's failure to make a timely request for a lingering doubt instruction.

31. Trial counsel submitted proposed jury instructions for the penalty phase of petitioner's case. In the proposed instructions, trial counsel did not include a lingering doubt instruction.

32. At the conclusion of the penalty phase, trial counsel orally requested a lingering doubt instruction. The prosecutor objected to the lingering doubt instruction on the grounds that trial counsel's request was not timely. The trial court denied the instruction as untimely.

33. The case law was clear that petitioner was entitled to a lingering doubt instruction if such an instruction was requested.

34. There was no physical evidence connecting petitioner to the killings charged in Counts I and II. The jury deliberated for approximately three days at the guilt phase. Had a lingering doubt instruction been given, there would have been a more favorable result at the penalty phase.

35. Assuming that trial counsel's failure to request a lingering doubt instruction was untimely, his failing was unreasonable. It deprived petitioner of a fundamentally fair and reliable penalty trial.

CLAIM 122: Petitioner was Deprived of his Constitutional Rights as a Result of Falsification of Sgt. Carter's Alleged Interrogation Notes.

1. At least 11 pages of notes were purportedly prepared on October 27 and 28, 1978 by Sgt. Lloyd Carter of the South Gate Police Department in connection with the arrest and interrogation of petitioner. However, the notes were finally first certified as authentic on February 11, 1982, more than three years after they were purportedly made.

2. Although they were clearly subject to the continuing 1979 discovery order,

these notes were not provided to petitioner or his counsel during discovery at the first trial and were not made available at petitioner's motion to suppress evidence at the second trial. Following this Court's reversal which ruled that the notes were discoverable, the notes were first made available to petitioner and his counsel at the retrial seven years later.

3. The purported interrogation notes are in a narrative form and contain complete sentences. The detail and physical appearance of the notes are inconsistent with contemporaneous interrogation notes. It is reasonably evident that the notes were prepared at sometime after the arrest and interrogation of petitioner. Exhibit S-B, Purported interrogation notes of Sgt. Lloyd Carter.

4. Sgt. Carter used the purported notes at the second trial allegedly to refresh his recollection and assist him in his testimony. The notes falsely enhanced the appearance of credibility of Sgt. Carter's testimony regarding his recollection of alleged admissions by petitioner.

5. Absent the purported interrogation notes, Sgt. Carter's testimony regarding his recollection of alleged admissions by petitioner would have been less thorough, credible and convincing. The result of the proceedings would have been more favorable to petitioner on both the questions of guilt and penalty.

6. The government's reliance on and exploitation of the falsified notes deprived petitioner of a fundamentally fair and reliable guilt and penalty trial.

2. PENALTY PHASE.

CLAIM 123: The various flaws of the Sentencing Procedure Used in this Case Render the Death Sentence Arbitrary, Capricious, and Unconstitutional.

1. The facts in support of this claim, in addition to those to be proved after further investigation and following full discovery and an evidentiary hearing to the extent appropriate, include the following. The 1977 California capital sentencing statute, under which petitioner (along with a very small handful of others) was sentenced suffers from a

wide variety of statutory, procedural and substantive defects. These defects, which separately and together violate state and federal due process, cruel and unusual punishment prohibitions and Eighth Amendment reliability requirements, fail to give the jury proper guidance and result in vague, arbitrary and capricious selection of capitally sentenced individuals. *See Furman v. Georgia*, 408 U.S. 238; *Gardner v. Florida*, 430 U.S. 349 (1977).

2. Specifically, the failure of the statute and the failure of the jury instructions given by the trial court to designate which sentencing factors are mitigating and which are aggravating violated petitioner's right to a reliable and fair sentencing determination under the United States and California Constitutions. *See Walton v. Arizona*, 497 U.S. 639 (1990); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Gardner v. Florida*, 430 U.S. 349; *but see People v. Marshall*, 50 Cal.3d 907, 936-37 (1990); *People v. Jackson*, 28 Cal.3d 264, *cert. denied* 450 U.S. 1035 (1981). It is well established that jurors do not independently understand the meaning of aggravation and mitigation. *See People v. Marshall*, 50 Cal.3d at 936.

3. The failure of the trial court to instruct the jury that it must find that death is the appropriate sentence beyond a reasonable doubt violated petitioner's federal and state constitutional rights. *See State v. Wood*, 648 P.2d 71, 83 (Utah 1982), *cert. denied* 459 U.S. 988; *but see Marshall*, 50 Cal.3d at 935-36; *People v. Rodriguez*, 42 Cal.3d 730 (1986); *People v. Allen*, 42 Cal.3d 1222 (1986), cert. denied 484 U.S. 872 (1987). The cruel and unusual punishment clause of the Eighth Amendment and the due process clause of the Fourteenth Amendments, as well as Article I, §§ 7, 15, and 17 of the California Constitution, require the prosecution to bear this heavy burden when the imposition of the death penalty is at stake.

4. The failure of the trial court to instruct the jury that it must find that aggravation outweighed mitigation beyond a reasonable doubt violated petitioner's federal

and state constitutional rights. *See Wood*; *but see Marshall*, *Rodriguez*, and *Allen*. In like fashion, the failure to instruct that aggravating circumstances were true beyond a reasonable doubt violated the same rights. *See Wood*; but see *People v. Gordon*, 50 Cal.3d 1223, 1273 (1990), cert. denied, 499 U.S. 913 (1991); *Marshall*, *Rodriguez*, and *Allen*.

5. The 1977 death penalty statute is unconstitutional because it does not require: (a) written findings as to the aggravating factors selected by the jury; (b) proof beyond a reasonable doubt or any of the aggravating factors; (c) jury unanimity on aggravating factors; (d) a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt; (e) a finding that death is the appropriate punishment beyond a reasonable doubt; and (f) a procedure to enable a reviewing court to evaluate meaningfully the sentencer's decision. *See People v. Jackson*, 28 Cal.3d 264, 315-17 (dissenting opinion by Bird, C. J.) (1981); but see *People v. Frierson*, 25 Cal.3d 142, 172-188 (1972).

6. The trial court's failure to instruct the jury that the sentence of life without parole means that the defendant will never be considered for parole, or otherwise correct the commonplace misunderstanding that California jurors possess regarding the release of defendants who have received a sentence of life without possibility of parole, in violation of the Sixth, Eighth and Fourteenth Amendments. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985); but see *Gordon*; *People v. Bonin*, 46 Cal.3d 659, 698 (1989), cert. denied 494 U.S. 1039 (1990).

7. The trial court's failure to instruct the jury to consider affirmatively all sympathetic mitigating factors, mercy and non-statutory mitigation violated petitioner's right to an individualized and reliable sentencing determination. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Parks v. Brown*, 860 F.2d 1545 (10th Cir. en banc 1988); but see *People v. Caro*, 46 Cal.3d 1035, 1067 (1988), cert. denied 490 U.S. 1040 (1989).

8. The use of a felony to (a) qualify petitioner for a first-degree murder

conviction under the felony-murder theory and (b) enhance aggravation in favor of death under Penal Code § 190.2(a) results in a violation, under the state and federal constitutions, of petitioner's rights to a reliable individualized sentencing determination and misleads the sentencing jury. *Furman*, *Caldwell*; *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985); but see *Lowenfield v. Phelps*, 484 U.S. 231, 241-46 (1988); *Marshall*.

9. The trial court's failure to specifically instruct the jury that the "no-sympathy" admonition of CALJIC 1.00, which was given at the guilt phase, did not apply at the penalty phase, denied petitioner the right to a reliable sentencing process under the Eighth Amendment.

10. The trial court's instruction on extreme mental disturbance violated petitioner's right to have the sentencer consider all mitigating factors. *Penry*; *Mills v. Maryland*, 486 U.S. 367 (1988); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); but see *Marshall*.

11. The 1977 death penalty law violated the Fourteenth Amendment and Article I, § 7, of the California Constitution because it deprives defendants of the benefits of the Determinative Sentencing Act. *But see Marshall*; *People v. Williams*, 45 Cal.3d 1268, 1330 (1988).

12. The jury was instructed to consider "whether or not" the defendant committed the crime while "under the influence of extreme mental or emotional disturbance" (RT 2973) and "whether or not" the defendant's "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental illness or defect or the effects of intoxication." (RT 2973). The jury could well have concluded that the absence of these mitigating factors established aggravation. The trial court's failure to instruct the jury that lack of mitigation does not constitute aggravation violated petitioner's state and federal rights to a reliable and fair-sentencing process. *Mills*; cf. *People v. Davenport*, 41 Cal.3d at 289.

13. Admission of prior crimes evidence as an aggravating factor in the penalty phase denied petitioner his right to due process and equal protection of law under the Fourteenth Amendment freedom from an impermissible risk of arbitrary and capricious decision-making under the Eighth and Fourteenth Amendments and reliable penalty determination under the Eighth and Fourteenth Amendments.

14. Failure to charge the underlying felony denied petitioner a reliable guilt determination as required by the Fifth and Eighth Amendments.

15. Failure to permit petitioner to make an allocution to the jury at the penalty phase without being subject to cross-examination denied petitioner his due process rights under the Fourteenth Amendment. *Boardman v. Estelle*, 957 F.2d 523 (9th Cir. 1990); but see *People v. Gallego*, 52 Cal.3d 115 (1990) and *People v. Robbins*, 45 Cal.3d 867, 888-890 (1988).

16. Failure to have petitioner present during the jury instruction conference denied petitioner his rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments.

17. Petitioner was deprived of his federal and state constitutional rights to due process and a fair trial by the trial court's instruction pursuant to the language of CALJIC 2.90 which, with its repeated use of the phrase "moral," first with respect to "moral evidence" and then with respect to "moral certainty," improperly diluted the prosecution's constitutionally imposed burden of proof beyond a reasonable doubt. *Cage v. Louisiana*, 498 U.S. 39 (1990); cf. *People v. Wilson*, 3 Cal.4th 926 (1992).

3. APPELLATE CLAIMS.

CLAIM 124: By Failing to Preserve a Complete Record on Appeal, the Court Deprived Petitioner's Due Process Rights and State Created Liberty Interests under the Fourteenth Amendment.

1. A defendant has a due process right to an accurate record on appeal. *People v. Gloria,* 47 Cal. App. 3d 1 (1975). §190.9 of the Penal Code requires that in "any case in which a death sentence may be imposed . . . all conferences and proceedings, whether in

open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present."

2. Petitioner has a right to a record on appeal including a complete transcript of the trial proceedings. *United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994). "Counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution." *Hardy v. United States*, 375 U.S. 277 (1964); *see also United States v. Nolan*, 910 F.2d 1553 (7th Cir. 1990); *United States v. Carrillo*, 902 F.2d 1405 (9th Cir 1990) .

3. The record is the basis for an appeal; a party cannot intelligently prepare a brief until the character of the record on appeal is known. *Peebler v. Olds*, 26 Cal.2d 656, 658 (1945). The existence of such state procedural rights gives appellant a "substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by . . ." such rights, *i.e.*, any violation of these state-defined procedural rights also constitutes a federal constitutional due process violation under the Fourteenth Amendment. *Hicks v. Oklahoma*, 447 U.S. 343, 346-347 (1980).

4. The Supreme Court has noted that it has generally "emphasized before the importance of reviewing capital sentences on a complete record." *Dobbs v. Zant,* 506 U.S. 357 (1993). This is so because a panoply of constitutional rights are specifically involved when the accuracy of a capital case record is at issue.

5. The Fifth and Fourteenth Amendments guarantee the right to due process in the appeal's consideration, *see Frank v. Mangum*, 237 U.S. 309, 327-328 (1914); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948), *e.g.*, in the resolution of the record's accuracy and completeness, particularly in any record reconstruction proceedings. This is so because:

> Under the Fourteenth Amendment, the record of the proceedings must be sufficient to permit adequate and effective appellate review. *Griffin v. Illinois* (1956) 351 U.S. 12, 20 [100 L.Ed. 891, 76 S.Ct. 585]; *Draper v.*

Washington (1963) 372 U.S. 487, 496-499 [9 L.Ed.2d 899, 905-907, 83 S.Ct. 774].

People v. Howard, 1 Cal.4th 1132, 1166 (1992); *see People v. Barton*, 21 Cal.3d at 517-518.

6. Additionally, appellant has the Fifth and Fourteenth Amendment due process "right not to be denied an appeal for arbitrary or capricious reasons" *Griffin v. Illinois*, 351 U.S. at p. 37 (Harlan, J., diss.), the right to an accurate record on appeal, *People v. Gloria,* 47 Cal.App.3d 1, 7 (1975), the right to a review of all legally admissible evidence, *People v. Johnson,* 26 Cal.3d 557, 576-577 (1980), and the right to review on a record settled in accordance with procedural due process. *Chessman v. Teets*, 354 U.S. 156, 162-165 and n. 12 (1957); *People v. Pinholster* 1 Cal.4th 865, 923, n. (1992).

7. The Sixth Amendment, through the Fourteenth Amendment, guarantees effective counsel on appeal, which in turn imposes on that counsel both the obligation to brief all arguable issues, citing the appellate record and appropriate authority and the preliminary obligation to insure that there is an adequate record before the appellate court to resolve those issues. *People v. Barton*, 21 Cal.3d at 518-520. When the record is missing or incomplete, "counsel must see that the defect is remedied" or counsel will fail to provide a competent level of advocacy. *Id.,* at 520.

8. Additionally, the Fourteenth Amendment guarantees the right to equal protection in the formulation of procedures used in deciding appeals (*Evitts v. Lucy*, 469 U.S. 387, 393 (1985); *People v. Barton*, 21 Cal.3d at p. 517, n. 1), which is applicable here in that other capital appellants are not subjected to incomplete appellate records.

9. Finally, the Eighth Amendment requires that the record be sufficient to ensure that there is no substantial risk the death sentence has been arbitrarily imposed. *People v. Howard*, 1 Cal.4th at 1166. This is particularly so as to errors involving the appellate record: "it is important that the record on appeal disclose to the reviewing court

the considerations which motivated the death sentence in every case in which it is imposed." *Gardner v. Florida,* 430 U.S. 349, 361 (1977). Otherwise, the "capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*." *Gardner v. Florida*, 430 U.S. at 361.

10. Each of the above federal constitutional protections is also magnified by the Eighth Amendment's requirement of heightened reliability in capital cases. *See Beck v. Alabama*, 447 U.S. 625, 638 and n. 13 (1980); *see also McElroy v. United States Ex Rel. Guagliardo*, 361 U.S. 249, 255 (1960) (Harlan, J., diss.). All the same rights are also guaranteed under the California Constitution's parallel provisions. (Art. I, §§ 1, 7, 15, 16, 17 and 24).

11. The record of petitioner's two trials is incomplete in significant ways.

a. At several points during the trial, the court reported parenthetically that "(A discussion was held off the record)." (RT 7, RT 27, RT 97, RT 100). The discussions should have been recorded or reconstructed.

b. While discussing defense counsel's motion for severance, trial counsel said "aside from what I mentioned in chambers." The discussion held in chambers was not recorded and was never reconstructed. (RT A41).

c. Sixty nine pages of the Reporter's Transcript are missing. (RT A207-A276).

d. On at least two occasions, the transcripts of *in camera* proceedings were sealed. "(The notes of the proceedings held in camera, at this point were ordered sealed by this court, not to be opened, transcribed, or destroyed.)" (RT 101A, RT 298).

e. On RT 110, the court observed that there had been a change in the law. He told both parties that no conferences were to be held off record any longer. The judge stated that the last one held was on 1/1/87, though there

had actually been one on 1/9/87.

f. The trial court noted that this Court has " indicated that they will not certify the record as being complete, if Mr. Memro was to receive the death penalty, until there has been a memorialization by the judge and two, three, four counsel, however many are involved, regarding all of these conversations. Before more time passes, I would suggest that the two counsel discuss this matter with any previous courts and determine what, if any, conferences have been held off the record." (RT 190). The parties failed to go back and reconstruct the gaps in the transcripts.

g. The court telephoned both parties when the jurors asked a question. The question was: "Does Penal Code 288 regarding the definition of a lewd act with a child apply to both living and deceased bodies?" (RT 2872). The judge read trial counsel the question over the telephone and asked the prosecutor to "come up" and read the question. The conversations were off the record and not transcribed or reconstructed. (RT 2872).

h. The jury questionnaires were not preserved as part of the record.

i. The court allowed a jury view of the crime scene on May 11, 1987. No record was made of what was said or done at the park before the jury. (RT 3027). The court stated on the record after the view that no testimony was taken but added that Officer Barclift showed the jury where pieces of evidence were found. Petitioner was unable to hear what transpired at the view as he was confined to a squad car. The view should have been memorialized and it was error to fail to do so.

j. On May 18, 1987, the jury requested a read back of petitioner's purported confession. The court told the jury that "the reporter and counsel have gone through the transcripts and picked out and selected the testimony

you've asked to be read back." The discussion between counsel and the reporter was not recorded. (RT 2878).

k. No municipal court proceedings were included as part of the record of the first trial in 1978.

l. On December 14, 1978, an in camera conference was held. No record of the conference was made or preserved. (1978 RT 4).

m. Discussions were held off the record in the first trial. (1978 RT 24, 1978 RT 29).

n. No Clerk's Transcript of the first trial was preserved.

o. Page 132 of the 1978 Reporter's Transcript is missing. Page 131 only includes the first four lines. Barely visible type towards the bottom indicates that testimony from the rest of that page and the absent page 132 is missing.

12. The errors regarding the record occurred in a capital case where due process standards of reliability are higher than in other cases. *Beck v. Alabama*, 447 U.S. at 638 and n. 13; *McElroy v. United States Ex Rel. Guagliardo*, 361 U.S. at 255 (Harlan, J., diss.). Due process is an evolving concept (*Frank v. Maryland*, 359 U.S. 360, 371 (1959)), and reviewing courts often refer to the current practices of other states to evaluate their own application of due process standards. *Schad v. Arizona,* 501 U.S. 624 (1991).

13. Relying on the inherent "gravity of the offenses for which defendant was tried and the penalty of death which was imposed," *i.e.*, the Eighth Amendment requirement of heightened capital case due process which requires a heightened reliability in the record, other state appellate courts facing analogous capital case record gaps have vacated death judgments without any showing of prejudice and ordered that the appellants be given new trials. *State of North Carolina v. Hamlet,* 321 S.E.2d 836, 387 (N.C. 1984); *see Dunn v. State of Texas*, 733 S.W.2d 212, 216-217 (Tex. 1987 Tex. Cr. App.) (inadequate capital

record mandates reversal absent any showing of prejudice, as a matter of policy for the preceding forty years).[32]

14. Finally, these constitutional violations cannot be resolved because the errors at issue affected the composition of the record. When a constitutional error affects the composition of the record, a reviewing court is precluded from applying a harmless error analysis. *Rose v. Clark*, 478 U.S. 570, 579, n. 7 (1986) (*citing Holloway v. Arkansas,* 435 U.S. 475, 490-491 (1978); *Satterwite v. Texas,* 486 U.S. 249, 256-257 (1988)). In such a situation, reversal is automatic. *Ibid; see Coleman v. McCormack,* 874 F.2d 1280, 1289 (9th Cir. 1989).

15. The Fourteenth Amendment requires that, once avenues of appellate review are established, they must "be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S 305, 310 (1966).

16. Due process also includes the right not to be denied an appeal for arbitrary or capricious reasons, *Griffin v. Illinois,* 351 U.S. at 37; the right to an accurate and complete appellate record, *People v. Gloria,* 47 Cal.App.3d at 7; *Gardner v. Florida*, 430 U.S. at 361; a review of all legally admissible evidence, *People v. Johnson,* 26 Cal.3d at 576-577; review on a record settled in accordance with procedural due process, *Chessman v. Teets,* 354 U.S. at 162-165 and n. 12; and due process in the appeal's consideration, *Cole v. Arkansas,* 333 U.S. at 201, including effective assistance of counsel in the appeal. *Evitts v. Lucy,* 469 U.S. at 392-393.

---

[32] Some states apparently follow the same policy in non-capital appeals. *Lucero v. State of Florida,* 564 So.2d 158, 158 (Fla. 1990) [non-transcribed in-camera hearing]; *People v. Briggs*, 557 N.Y.S. 797, 798 (N.Y. 1990 N.Y.S.Ct., App. Div.) [lost trial transcript; "interests of justice"]. Some federal circuits also reverse even non-capital convictions automatically, i.e., without a showing of prejudice, when there are significant record gaps and the appellant's counsel is, as here, new to the case, because such new counsel ". . . cannot reasonably be expected to show specific prejudice." *United States v. Renton*, 700 F.2d 154 (5th Cir. 1983) (*citing United States v. Selva,* 559 F.2d 1303, 1305-1306 (5th Cir. 1977)).

17. This latter protection is also afforded by the Sixth Amendment's guarantee of competent counsel, as applicable through the Fourteenth Amendment. *People v. Barton,* 21 Cal.3d at 518-520. Such counsel is obliged to perfect the record and remedy imperfections, including those involving exhibits. *Id.,* at 19-20.

18. Petitioner also has a Fourteenth Amendment right to equal protection of law, along with due process, in the formulation of procedures used in deciding appeals. *Evitts v. Lucy*, 469 U.S. at 393. Petitioner must have the same right to a reliable record as other criminal and capital petitioners, each of whom is convicted only on proof beyond a reasonable doubt and each of whom has the trial record - including exhibits - of that conviction's evidentiary basis preserved as the basis for appeal and the context for appellate courts to evaluate any error's harm. California goes to great lengths to ensure preservation of criminal appellants' trial records pending appeal, particularly in capital cases. (*E.g., see* §§ 1417 et seq., and especially §§ 1417.1, subd. (d) and 1417.7, regarding preservation; § 190.7, subd. (a) and California Rules of Court, rules 4.5, 5(a), 39.5(a) and 39.5(b), defining the clerk's record on appeal to include all exhibits admitted into evidence or refused). These protections go not only to appellant's equal protection right to have a record reconstructed under standards the same as used at trial, i.e., on proof beyond a reasonable doubt, which constitutes an independent constitutional violation here but also to the importance of the record's reliability.

19. The reliability of the record is integral to each of the above federal constitutional guarantees. "The failure of the trial court to provide an accurate record on appeal is reversible error." *In re Jose S.*, 78 Cal. App. 3d 619 (1978). Therefore, as petitioner's transcripts are incomplete, efforts for post-conviction relief are hampered. The trial court's failure to preserve an accurate and complete record of the capital trial constitutes reversible error.

CLAIM 125: Petitioner's Rights were Violated by Erroneous Rulings and Factual Errors by this Court.

1. Petitioner's conviction, special circumstance findings and sentence of death are illegal and were unconstitutionally obtained in violation of his Sixth, Eighth and Fourteenth Amendment rights to a fair trial, to the effective assistance of counsel, to a reliable and accurate determination of guilt and sentence of death, to reasonable appellate review of his conviction and to due process of law, as a result of this Court's erroneous rulings and factual errors.

2. This Court failed to provide petitioner with an adequate and meaningful appeal. In particular, the commissioner:

a. ignored petitioner's federal constitutional right against double jeopardy;

b. misstated the facts relevant to the issue of the voluntariness of the confession;

c. made factual errors regarding the evidence and arguments presented in support of the motion for severance of the counts;

d. made an error in the statement of facts relevant to the sufficiency of the evidence claim;

e. failed to analyze the destruction of the police complaint records as a *Brady* violation;

f. failed to analyze the extremely late provision to petitioner of 400 pages of discovery material as a *Brady* violation;

g. ignored the fact that the trial court had prevented petitioner from establishing a better record on the speedy trial issue;

h. ignored the fact that the record demonstrates that trial counsel did not believe petitioner could be tried on a felony-murder theory; and

i. made factual errors regarding the denial of the motion to suppress evidence.

3. Petitioner's petition for rehearing to this Court (Exhibit DD) is incorporated by reference as if set forth in full.

CLAIM 126: Petitioner was Denied the Right to due Process in his Appeal as of Right as a Result of this Court's Chief Justice's Political Support for Opposing Counsel in this Case.

1. After this case had been briefed before this Court and was set for oral argument then-Chief Justice Malcolm Lucas spoke at a public gathering and formally endorsed the gubernatorial candidacy of Attorney General Daniel Lungren, the attorney for the state in this matter.

2. Mr. Lungren regularly made public statements as to opinions and decisions of the courts and was one of the primary supporters of the Anti-terrorism and Effective Death Penalty Act (AEDPA), under which the decision of this Court in this case was to be reviewed. As Governor, Mr. Lungren would have the authority to appoint appellate judges, including judges on this Court and would also have fiscal powers over the judiciary, including but not limited to the power to "blue pencil" portions of this Court's budget.

3. Prior to oral argument, petitioner moved for recusal of the Chief Justice from his case. This motion was denied in an order signed by Chief Justice Lucas himself.

4. As a result of the above, petitioner was not given a fair hearing on his recusal motion or his appeal or state habeas petition.

CLAIM 127: This Court Failed to Conduct a Constitutionally Adequate Review of Petitioner's Case and Institutionally Does Not Conduct Such Review in Capital Cases.

1. Specific and objective enumeration of aggravating and mitigating factors is not provided to guide the jury. The language of the special circumstances and of the statutory sentencing factors is vague and over broad and fail to comport with requirements of due process and heightened capital case reliability under the Fifth, Sixth, Eighth and Fourteenth Amendments.

2. Meaningful appellate review does not occur because of the failure to require

written findings regarding any aggravating factors found to be true.

3. There is no requirement that the prosecution prove the existence of any aggravating factor (other than prior crimes under §190.3 (b)) beyond a reasonable doubt.

4. There is no requirement that a jury finding regarding the presence of an aggravating factor at the penalty phase be unanimous.

5. There is no provision for comparative appellate review to prevent inconsistency, arbitrariness, disproportionality and discrimination.

6. This Court has not provided meaningful appellate review in death penalty cases since it has affirmed approximately 95% of all capital cases that have come before it during the last decade. These affirmances occur even though the Court has found substantial errors in these cases but denoted them as harmless.

7. Petitioner was prejudiced and his sentence adversely affected because he was tried, convicted and sentenced to death under a statutory scheme which contained the defects stated above. These defects violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

8. This Court failed to grant petitioner discovery, an evidentiary hearing or subpoena power, despite petitioner's repeated requests for such.

9. By not providing for such procedures, the Court failed to ensure that habeas proceedings complied with even minimal guarantees of due process and heightened capital case reliability.

10. As the validity of the state habeas proceedings was fundamentally and constitutionally undermined, those proceedings should not be respected by this Court. By failing to conduct adequate proceedings, this Court denied petitioner his rights to Due Process and Equal Protection under the Fifth and Fourteenth Amendments, as well as his right to effective assistance of counsel and a fair trial before a jury under the Sixth Amendment and heightened capital case reliability and freedom from cruel and unusual

punishment.

4. STATUTORY CLAIMS.

CLAIM 128: The 1977 Death Penalty Statute, on its Face and as Applied, is Unconstitutionally Vague, Arbitrary and Capricious.

1. The 1977 death penalty statute is unconstitutional under the Eighth Amendment because the aggravating and mitigating factors listed in Penal Code § 190.3 do not comply with the prohibition against vagueness and because the statute conferred upon the sentencer the same degree of unbridled and unguided discretion condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). *See also Maynard v. Cartwright*, 486 U.S. 356 (1988).

2. The factors listed in Section 190.3, individually and in combination, fail to guide the sentencer's discretion and create an impermissible risk of vaguely defined, arbitrarily and capriciously selected individuals upon whom death is imposed. The statute requires the sentencer to consider a unitary list of factors without any explanation as to which factors, if any, are aggravating or mitigating.

3. As a whole, the statute thus allows the sentencer complete discretion to decide whether and for what reasons a defendant should die, including the power to impose death upon the unconstitutionally impermissible basis of mental impairment. This aspect of the statute alone violates the Eighth Amendment. *Zant v. Stephens*, 462 U.S. 862 (1983); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

4. The individual listed sentencing factors are equally imprecise.

a. Factor (a) instructs the sentencer to weigh the circumstances of the crime without any further limitation or guidance. Although this Court has defined this term in several inconsistent ways, it has never required that juries be given instruction as to its meaning.

b. Because factor (a) also directs the sentencer to weigh the presence of any special circumstance findings—a factor that necessarily is present in every

case—the sentencer's discretion is both unbridled and weighted in favor of death solely due to the fact that a defendant has been convicted of capital murder. Thus, the discretion conferred by the California statute is at best as standardless as that invalidated in *Furman v. Georgia*.

5. Here, the prosecution presented only one piece of evidence in its case-in-chief at penalty phase. The principal thrust of the prosecutor's argument to the jury was that the circumstances of the crime itself warranted the death penalty.

6. Petitioner's death sentence was thus based on the unguided consideration of the circumstances of the offense, without regard to the definition or reliability of such factors, as well as the absence of potentially mitigating factors which created illusory aggravation.

CLAIM 129: Many Features of the California Capital Sentencing Scheme as Interpreted by the State Courts and Applied at Petitioner's Trial Violate the Federal Constitution.

1. The trial court instructed petitioner's jury on the full array of statutory sentencing factors, without any effort to identify which were potentially aggravating or mitigating, without deleting factors which were irrelevant on the facts of this case and without any effort to narrow or give definition to any of the vague statutory language. The result was to authorize imposition of death upon impermissibly vague and otherwise improper aggravating circumstances in violation of the Eighth and Fourteenth Amendments.

2. Further, even apart from the violation of Eighth Amendment vagueness limitations, the instructions permitted the jury to aggravate petitioner's sentence upon the basis of behavior and character traits that should only have mitigated the sentence, thus violating due process and the Eighth Amendment. *See Zant v. Stephens*, 462 U.S. 862, 885 (1983).

3. The unitary list of aggravating and mitigating factors allowed the jury complete discretion to decide whether and for what reasons petitioner should die and

rendered the statute as applied unconstitutionally vague, arbitrary and capricious, because the jury was left without meaningful or principled guidance as to the meaning and application of the factors. *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420. It also allowed the jury to consider, in aggravation, factors such as age, mental or emotional disturbance, alcohol or drug impairment and positive background and character evidence, which may constitutionally be considered only in mitigation. *Zant v. Stephens,* 462 U.S. at 885. Further, the statutory factors intended solely as potential mitigators (factors (d), (e), (f), (g), (h), (j) and (k)), when viewed by an unguided jury as aggravating circumstances are too impermissibly vague to satisfy Eighth Amendment standards. *See Stringer v. Black*, 503 U.S. 222 (1992). The use of such a unitary list rendered the sentencing process unreliable, in contravention of the Eighth and Fourteenth Amendments.

4. The jury was instructed to consider "whether or not" the defendant committed the crime while "under the influence of extreme mental or emotional disturbance" and "whether or not" the defendant's "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental illness or defect or the effects of intoxication." *Ibid.* The jury could well have concluded that the absence of these mitigating factors established aggravation.

5. The failure to delete factually irrelevant mitigating factors violated the Fifth, Eighth and Fourteenth Amendments in that it permitted the jury to aggravate petitioner's sentence on the basis of factors that should have played no role in the sentencing process. The failure to delete irrelevant factors deprived petitioner of his right to an individualized sentencing determination based on permissible factors relating to him and the crime. This error, by artificially inflating the factors on death's side of the scale, violated the Eighth and Fourteenth Amendments' requirement of heightened reliability in the death

determination. *Ford v. Wainwright,* 477 U.S. at 414; *Beck v. Alabama,* 447 U.S. 625. The likelihood that the jury imposed sentence upon the basis of nonstatutory aggravation under a mistaken belief that lack of a mitigating factor was proper aggravation deprived petitioner of an important state procedural protection and liberty interest– the right not to be sentenced to death except upon the basis of statutory aggravating circumstances, *People v. Boyd*, 38 Cal.3d 762, and thereby violated petitioner's right to federal due process as well. *Hicks v. Oklahoma*, 447 U.S. 343.

6. The failure to require written findings by the jury on the aggravating factors selected by it deprived petitioner of his due process and Eighth Amendment rights to meaningful appellate review of his case, *California v. Brown,* 479 U.S. at 543; *Gregg v. Georgia,* 428 U.S. at 195, especially in light of the fact that the jury could have rested its decision to impose death on the improper considerations set forth above.

7 . The failure to require that all aggravating factors be proved beyond a reasonable doubt, that aggravation must be weightier than mitigation beyond a reasonable doubt and that death must be found to be the appropriate penalty beyond a reasonable doubt, violates federal principles of due process, (*Santosky v. Kramer*, 455 U.S. 745, 754-67 (1982); *In re Winship,* 397 U.S. 358), equal protection, and the Eighth and Fourteenth Amendment requirements of heightened reliability in the death determination. *Ford v. Wainwright,* 477 U.S. at 414; *Beck v. Alabama,* 447 U.S. 625.

8. Even if it were not constitutionally necessary to place a heightened burden of persuasion on the prosecution, some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied and capital defendants treated equally from case to case. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma,* 455 U.S. at 112. The trial court's failure to instruct on any penalty phase burden of proof deprived petitioner of his rights to due process, equal protection and

freedom from cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. It is unacceptable that one man should live and another die simply because one jury assigns the ultimate burden of persuasion to the state and another assigns it to the defendant.

9. The lack of any requirement of intercase or intracase proportionality review and of any meaningful such undertaking in this case at the time of trial or on appeal violates petitioner's Fourteenth Amendment right to equal protection– since such review is afforded non-capital inmates. Penal Code §1170(f). It also violates the Fifth, Sixth, Eighth and Fourteenth Amendment requirements that any death penalty not be arbitrary or capriciously imposed, (*Gregg v. Georgia,* 428 U.S. 153), that all potential mitigating factors be considered by the sentencer, and that a death-sentenced defendant receive meaningful appellate review. *Parker v. Dugger*, 498 U.S. 308 (1991). Lack of such review violates the Eighth and Fourteenth Amendments' heightened reliability requirements for the sentencing process in a capital case.

10. The inclusion in the list of potential mitigating factors such as "extreme" (see factors (d) and (g)); "substantial" (see factor (g)) and "reasonably believed" and "moral" (see factor (f)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *Mills v. Maryland*, 486 U.S. 367; *Lockett v. Ohio,* 438 U.S. 586. This wording rendered those factors unconstitutionally vague, arbitrary, capricious and/or incapable of principled application. *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia,* 446 U.S. 420 (1980). The jury's consideration of these vague factors introduced impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments.

11. Under California law, the individual prosecutor has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. This creates a substantial risk of county-to-county arbitrariness. Under this

statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while similar offenders in different counties will not be singled out for the ultimate penalty. The absence of any standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, including race and economic status. Further, under *People v. Morales,* 48 Cal.3d 527, the prosecutor is free to seek the death penalty in almost every murder case.

12. The arbitrary and wanton prosecutorial discretion allowed by the California scheme– in charging, prosecuting and submitting a case to the jury as a capital crime, merely compounds the disastrous effects of vagueness and arbitrariness inherent on the face of the California statutory scheme. Just like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina*, 428 U.S. at 303, such unprincipled, broad discretion is contrary to the principled decision-making mandated by *Furman v. Georgia.*

13. The trial court's failure to instruct the jury that the sentence of life without parole means that the defendant will never be considered for parole or otherwise correct the commonplace misunderstanding that California jurors possess regarding the release of life-sentenced prisoners, resulted in an unfair, capricious and inaccurate sentence determination in violation of the Sixth, Eighth and Fourteenth Amendments. *See Caldwell v. Mississippi,* 472 U.S. 320.

14. The failure of the trial court to instruct the jury that it must return a verdict of life without parole if the mitigating circumstances outweigh the aggravating circumstances renders the death judgment void under the state and federal constitution. Here, the jury was instructed pursuant to a modified version of CALJIC 8.84.2 as follows:

> The weighing of aggravating and mitigating circumstance does not mean a mere mechanical accounting [sic] of factors on each side as if an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.[¶] In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the

> aggravating circumstances with the totality of the mitigating circumstances. [¶] To return a judgment of death, each of you must be persuaded that the aggravating evidence or circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(RT 2903-2904).

15. The instruction did not include the following language from Penal Code §190.3:

> If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

As a result of this omission, there is a reasonable likelihood that the jurors could have concluded that, even if the mitigating factors outweighed those in aggravation, the "so substantial in comparison with" language of CALJIC 8.84.2 might demand imposition of death.

16. The failure to instruct by the language of the statute deprived petitioner of his due process rights under the Fourteenth Amendment, which protects petitioner from arbitrary deprivation of statutory rights and protections. *See Hicks v. Oklahoma,* 447 U.S. 343. Further, the omission of the statutory language from the jury instructions violated petitioner's constitutional rights under the Eighth Amendment by permitting the arbitrary and capricious imposition of a death sentence. *Zant v. Stephens,* 462 U.S. at 874.

CLAIM 130: Failure to Narrow the Class of Offenders Eligible for the Death Penalty and Imposition of Death in a Capricious and Arbitrary Manner.

1. Petitioner's conviction, judgment of death and confinement are unlawful and unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments because the California death penalty statute fails to narrow the class of offenders eligible for the death penalty and permits the imposition of death in an arbitrary and capricious manner.

2. In particular, petitioner's conviction of capital murder was violative of the Eighth and Fourteenth Amendments' requirements that the provisions of a state's death

penalty statute must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder and thereby resulted in the imposition of a freakish, wanton, arbitrary and capricious judgment of death. The failure to narrow the class of persons eligible for capital punishment deprived petitioner of his due process rights under the Fourteenth Amendment; it permitted arbitrary selection for prosecution without consistent guidelines to ensure reliability; and it violated the Eighth Amendment prohibition against cruel and unusual punishment. In addition, counsel's failure to object to these unconstitutional proceduresdeprived petitioner of his right to assistance of counsel.

3. Petitioner was convicted of first degree murder (Penal Code §187(a)) and sentenced to death. The sole special circumstance rendering petitioner eligible for imposition of a sentence of death was multiple murder.

4. Under the Eighth and Fourteenth Amendments, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers who may be subject to the death penalty. *Sawyer v. Whitley*, 505 U.S. 333 (1992); *McCleskey v. Kemp,* 481 U.S. 279, 305-306 (1987); *Zant v. Stephens*, 462 U.S. 862, 877-878 (1983). In 1972, in *Furman v. Georgia*, the Supreme Court struck down the death penalty schemes of Georgia, Texas and some other states as unconstitutional, because they created too great a risk of arbitrary death sentences. This conclusion derived from the Court's understanding that, as to the Georgia scheme, only 15-20% of convicted murderers, who were death eligible, were being sentenced to death. *Furman*, 408 U.S. at 386, n. 11 [Burger, C.J., dissenting]; *Id.*, at 435, n. 19 [Powell, J., dissenting]; *Gregg v. Georgia*, 428 U.S. 153, 182, n. 26 [plurality opinion]; see also Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman*? (1997) 72 N.Y.U.L. Rev. 1283, 1288 [hereafter *California Death Penalty Scheme: Requiem for Furman*].

5. California's death penalty statute as written fails to perform this narrowing,

and this Court's interpretations of the statute have actually *expanded* the statute's reach.

6. As written and applied, the California death penalty statute potentially sweeps the great majority of murders into its grasp and allows any conceivable circumstance of a crime -- even circumstances diametrically opposite (e.g., the fact that a decedent was young as well as the fact that a decedent was old, the fact that a decedent was killed at home as well as the fact that a decedent was killed outside the home) -- to justify the imposition of the death penalty.

7. Interpretations of California's death penalty statute by this Court and the Supreme Court have placed the decision narrowing the class of murderers to those most deserving of death on Penal Code §190.2, the "special circumstances" section of the statute.

8. Empirical evidence shows that virtually all first-degree murders in California are death eligible. According to a study published by Professor Steven F. Shatz of the University of San Francisco of published and unpublished decisions from 1988 through 1992, on appeals from first degree murder convictions, 84% of first degree murder cases were factually special circumstance cases under §190.2, thus rendering all such murderers death-eligible. (*California Death Penalty Scheme: Requiem for Furman*, 1332-1335.)

9. California's death penalty scheme defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than the pre-*Furman* death penalty schemes. Empirical evidence shows that, in contrast to Georgia's pre-*Furman* scheme, where 15% of convicted murderers who were death eligible were being sentenced to death. (*Id.* at 1288, n. 28). California's death penalty scheme results in a death sentence ratio of 11.4%. *(Id.* at 1332). California's statutorily defined death-eligible class is so large and imposition of the death penalty on members of the class so infrequent as to violate *Furman* and its progeny.

10. Penal Code §190.2's failure to genuinely narrow the class of death eligible

murderers is neither corrected nor ameliorated by Penal Code §190.3, the statute which sets forth the circumstances in aggravation and mitigation which the jury is to consider in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. In practice and as a result of interpretation by this Court, the §190.3 factors have been used in ways so arbitrary and contradictory as to violate due process of law. Furthermore, this Court's interpretations of the §190.3 factors have created a process biased in favor of death that does not genuinely narrow the pool of murderers to those most deserving of death.

11. California's statutory scheme is particularly death-biased in felony-murder cases because the California felony-murder rule itself is exceedingly broad; all first degree felony-murder cases are special circumstance cases and after rendering a first degree murder conviction and special circumstance finding based on felony-murder, the penalty jury is instructed to weigh the same felony-murder "crime circumstances" and the same felony-murder special circumstance(s) as factors in aggravation. (See, Penal Code §190.3(a)).

12. Safeguards employed by most other states to ensure a fair jury verdict are not a part of California law and the review of death judgments by this Court yields an affirmance rate higher than any other court in the country -- much higher than the affirmance rate in states such as Florida, Georgia, Virginia or Texas.

13. Individual prosecutors in California are afforded complete unguided discretion to determine whether to charge special circumstances and to seek penalties of death, thereby creating a substantial risk of county-by-county arbitrariness. *See People v. Adcox*, 47 Cal.3d at 275-76 (Broussard, J. conc.).

14. The death penalty law in California is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims for the ultimate sanction.

15. In 1977, the California legislature enacted a new death penalty law, that statute that Mr. Reno was prosecuted under. Under the law, one of twelve special circumstances had to be proved beyond a reasonable doubt to make a murderer death-eligible. (Stats. 1977, ch. 316, at 1255-1266). Under the statute, death eligibility was to be the exception rather than the rule. As stated by this Court, first degree murder was "punishable by life imprisonment except for extraordinary cases in which special circumstances are present." *Owen v. Superior Court*, 88 Cal.App.3d 757, 760 (1979), quoted with approval in *People v. Green*, 27 Cal.3d 1, 48 (1980). Also, according to this Court, the special circumstances were intended to define death eligibility in California and thus perform the narrowing function required by *Furman*. *Id.*, at 61.

16. As a result of the number of special circumstances, the legislative definition of first degree murder and judicial rulings on the scope of first degree murder, the special circumstances and common felonies statutes, a substantial majority of murders in California have been first degree murder and, in virtually all of them, at least one special circumstance could be proved.

17. The real breadth of the special circumstance categories is not in the number of categories alone or in the number that produce death sentences but in two factors which, in combination, makes California's scheme exceptional.

18. First, California, along with only seven other states (Florida, Georgia, Maryland, Mississippi, Montana, Nevada and North Carolina) makes felony-murder simpliciter a narrowing circumstance. *See People v. Anderson*, at 1104. Although the felony-murder language of Penal Code §189 is not identical to the special circumstance language (referring to "perpetration" rather than "commission" and omitting any reference to "flight"), in application there is no difference. *See People v. Hayes,* 52 Cal.3d 577 (1990).

19. Second, California, along with only three other states, Colorado, Indiana and

Montana, makes "lying-in-wait" a narrowing circumstance. (Penal Code §190.2(a)(15)). As interpreted by this Court, this circumstance encompasses a substantial portion of premeditated murders. Only California and Montana have death penalty schemes with both felony-murder simpliciter and lying-in-wait narrowing circumstances and, unlike California's numerous and broad felony-murder special circumstances, Montana's felony-murder narrowing circumstances encompass only two felonies: aggravated kidnaping and sexual assault on a minor. (*See* Mont. Code Ann. §46-18-303(7), (9) (1995)).

20. At the time of petitioner's trial, there was substantial overlap between the intentional murders committed by listed means in §189 and the special circumstances set forth in §190.2. Four of the five "means" listed in §189 (murders by destructive device or explosive, poison, torture and lying in wait) were also special circumstances in intentional killings. (*See* Pen. Code §190.2(a)(4), (a)(6), (a)(15), (a)(18), and (a)(19)).

21. There also was substantial overlap between the felony murders listed in §189 and the special circumstances listed in Penal Code §190.2(a)(17). Five of the six felonies listed in §189 (arson, rape, robbery, burglary and violations of Pen. Code §288(a)) also were special circumstances). (*See* Pen. Code §190.2, subds. (a)(17)(I), (a)(17)(iii), (a)(17)(v), (a)(17)(vii) and (a)(17)(viii).) Only mayhem could have been the basis for a first degree felony-murder conviction without also making the murderer death eligible.

22. The only intentional first degree murders not expressly qualifying for the death penalty were those where the first degree murder was established by proof of premeditation and deliberation. Some such murders would have been capital murders because the defendant committed another murder, (Pen. Code §190.2, subds. (a)(2), (a)(3)), the defendant acted with a particular motive (Pen. Code §190.2, subds. (a)(1), (a)(5), (a)(16)), or the defendant killed a particular victim (Pen. Code §190.2, subds. (a)(7) - (a)(13)).

23. Virtually all the remaining premeditated murders also would have been

capital murders because, by definition, most premeditated murders are done while the defendant was lying in wait. Pen. Code §190.2, subd. (a)(15); *People v. Morales*, 48 Cal.3d 527, 557, 575 (1989); *People v. Ceja,* 4 Cal.4th 1134, 1147 (1993) [conc. opn. of Kennard, J.].

24. Although the term "lying in wait" carries with it the connotation of an ambush from hiding, this Court has given this special circumstance a far more expansive interpretation. According to this Court, lying in wait is established if the defendant: (1) concealed his purpose to kill the victim; (2) watched and waited for a substantial period for an opportune time to act; and (3) immediately thereafter launched a surprise attack on the victim from a position of advantage. *People v. Morales*, at 557. This Court has interpreted the second element to require only that the duration of the watching and waiting be "such as to show a state of mind equivalent to premeditation or deliberation." *People v. Edelbacher*, 47 Cal.3d 983 (1989). As a result, whether a premeditated murder is done while lying in wait turns on the first and third elements.

25. Most premeditated murders satisfy those two elements. It will be a rare premeditated murder, i.e., a murder done "as a result of careful thought and weighing of considerations . . . carried on coolly and steadily, [especially] according to a preconceived design," (*People v. Bender*, 27 Cal.2d 164 (1945)), where the defendant reveals his purpose in advance or fails to try to take the victim from a position of advantage.

26. Thus, the lying-in-wait special circumstance applies to a wide variety of first degree murders, ranging from the true ambush to murders where the defendant follows the victim for a period before the killing, lures the victim into a trap, engages the victim in conversation and then attacks the victim from behind or kills the victim in his or her sleep.

27. The situation is similar with regard to unintentional first degree murders. Unintentional murders are first degree murders by virtue of the felony-murder rule. (Penal Code §189). An unintentional killing during one of the listed felonies (except mayhem)

makes the actual killer death eligible.

28. At the time of petitioner's trial and in the years following, the broad reach of the felony-murder rule has resulted from three factors:

a. The felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary, crimes which themselves are defined very broadly by statute and court decision;

b. The felony-murder rule applies to killings occurring even after completion of the felony, if the killing occurs during an escape, i.e., before the defendant reaches a place of "temporary safety," or as a "natural and probable consequence" of the felony. *People v. Cooper,* 53 Cal.3d 1158 (1991); *People v. Birden*, 179 Cal.App.3d 1020 (1986).

c. The felony-murder rule is not limited in its application by normal rules of causation and applies to altogether accidental and unforeseeable deaths:

"[F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." *People v. Dillon*, 34 Cal.3d 441, 447 (1983).

29. The combination of the felony-murder special circumstances, which themselves perform no narrowing function at least as to the actual killer and the lying-in-wait special circumstance, which by definition encompasses most premeditated murders,

means that Penal Code §190.2 does not effect any significant narrowing.

30. The breadth of Penal Code §190.2 is more than just theoretical. Empirical evidence compiled by Professor Steven F. Shatz confirms what is evident from the face of the statute: his survey of 596 published and unpublished decisions on appeals from first and second degree murder convictions in California, from 1988 through 1992, as well as 78 unappealed murder conviction cases filed during the same period in three counties, Alameda, Kern and San Francisco, demonstrates that Penal Code §190.2 fails to perform the narrowing function required under the Eighth and Fourteenth Amendments. (*California Death Penalty Scheme: Requiem for Furman*, 1327-1335.).

31. According to this survey, this Court reversed a capital case, in whole or in part, only once because of insufficient evidence to support the finding of special circumstances. *See People v. Morris*, 46 Cal.3d 1 (1988).

32. The results of this study of published appeals from first degree murder convictions are set forth in *California Death Penalty Scheme: Requiem for Furman,* Table 1, "Narrowing Effect of §190.2 in Published Appeals from First Degree Murder Convictions (1988-1992)". This report makes clear the following points:

a. First, the overwhelming majority (92%) of non-death judgment first degree cases are also factually special circumstance cases.

b. Second, the felony-murder special circumstances play the predominant role in defining death-eligibility in the California scheme. One or more of the felony-murder special circumstances was proved in almost three-quarters (74%) of the death judgment cases and in 60% of the other actual or potential special circumstance cases. *(California Death Penalty Scheme: Requiem for Furman*, 1328-1330.)

33. The results of this study of unpublished appeals from first degree murder convictions are set forth in *California Death Penalty Scheme: Requiem for Furman*,

Table 2, "Narrowing Effect of §190.2 in Unpublished Appeals from First Degree Murder Convictions (First Appellate District, 1988-1992)". This report makes clear the following points: The data for the unpublished cases generally confirm the data for the published cases. Again, the overwhelming majority (85%) of first degree murder cases are factually special circumstance cases, with the majority of the special circumstance cases being felony-murder cases. The distribution of special circumstances closely tracks the distribution in the published non-death judgment first degree murder cases. (*Id.*, at 1330).

34. The published case sample indicates that 92% of non-death judgment first degree murder cases are factually special circumstance cases, while the unpublished case sample puts the number at 85%. When the percentages for the three categories of first degree murder cases (death judgment cases, published non-death judgment cases and unpublished cases) are combined according to their respective proportions of total first degree murder cases, the result is that approximately 87% of first degree murder cases are factually special circumstance cases. Thus, approximately seven out of eight first degree murder cases are factually special circumstances cases, the majority of first degree murders are felony murders, and felony murders are virtually all special circumstance murders. Accordingly, California's felony-murder special circumstances, pursuant to which petitioner became death-eligible, alone defeat any possibility of genuine narrowing. (*Id.* at 1330-1332.)

35. The class of first degree murderers is narrowed to a death-eligible class not only by the special circumstances of §190.2, but also by Penal Code §190.5, which forbids application of the death penalty to anyone under the age of eighteen at the time of the commission of the crime. When juvenile first degree murderers are excluded from the calculation, the result is that more than 84% of first degree murderers are statutorily death-eligible under Penal Code §190.2. (*Id.* at 1332.)

36. Professor Shatz' study thus demonstrates that Penal Code §190.2 fails to

genuinely narrow the group of murderers who may be subject to the death penalty and does not address the risk of arbitrariness prohibited by the Eighth and Fourteenth Amendments. According to this study, only 9.6% of those statutorily death-eligible under California's death penalty scheme are actually sentenced to death. If 84% of first degree murderers are statutorily death-eligible and only 9.6% are sentenced to death, California has a death sentence ratio of 11.4% . This ratio is significantly below the assumed percentage of death judgments at the time of *Furman* (15-20%), a percentage impliedly found by the majority of the Supreme Court to create enough risk of arbitrariness to violate the Eighth Amendment. (*Id.* at 1283, 1332.)

37. Because almost all first degree murders in California fall within the special circumstances enumerated in Penal Code §190.2, the death penalty statute fails to genuinely narrow the class of death eligible murderers in violation of the Eighth and Fourteenth Amendments. As a consequence, the death-eligible class is so large that fewer than one out of eight statutorily death-eligible convicted first degree murderers is actually sentenced to death. Under California's death penalty scheme, there is no meaningful basis to distinguish the cases in which the death penalty is imposed. California's scheme defines death-eligibility so broadly that it creates a greater risk of arbitrary death sentences than the pre-*Furman* death penalty schemes.

38. Penal Code §190.2's failure to genuinely narrow the class of death eligible murderers is neither corrected nor ameliorated by Penal Code §190.3, the statute which sets forth the circumstances in aggravation and mitigation which the jury is to consider in determining whether to impose a sentence of death upon a defendant convicted of special circumstance murder. The purpose of this statute, according to its language and according to interpretations by both this Court and the Supreme Court, is to inform the jury of what factors it should consider in assessing the appropriate penalty. In actual practice, it has been used in ways so arbitrary and contradictory as to violate due process of law.

39. Factor (a), listed in §190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" meets constitutional scrutiny, this Court has never applied any limiting construction to this factor, even to eliminate blatant capriciousness. Instead, the Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because the defendant had a "hatred of religion," (*People v. Nicolaus,* 54 Cal.3d 551, 581-582 (1991)); or because three weeks after the crime defendant sought to conceal evidence, (*People v. Walker,* 47 Cal.3d 605, 639, fn. 10 (1988)); or threatened witnesses after his arrest, (*People v. Hardy,* 2 Cal.4th 86, 204 (1992)); or disposed of the decedent's body in a manner that precluded its recovery (*People v. Bit taker,* 48 Cal.3d 1046, 1110, fn. 35 (1989)).

40. Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds,[33] or because the defendant killed with a single execution-style wound.[34]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest,

---

[33] *See, e.g., People v. Morales*, Cal. Sup. Ct. No. S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[34] *See, e.g., People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

sexual gratification)[35] or because the defendant killed the victim without any motive at all.[36]

c. Because the defendant killed the victim in cold blood[37] or because the defendant killed the victim during a savage frenzy.[38]

d. Because the defendant engaged in a cover-up to conceal his crime,[39] or because the defendant did not engage in a cover-up and so must have been proud of it.[40]

e. Because the defendant made the victim endure the terror of anticipating a violent death[41] or because the defendant killed instantly without

---

[35] *See, e.g., People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004379, RT 31 (revenge).

[36] *See e.g., People v. Edwards*, No. S004755, RT 10544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[37] *See, e.g., People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[38] *See, e.g., People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[39] *See, e.g., People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[40] *See, e.g., People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[41] *See, e.g., People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11125; *People v. Hamilton*, No. S004363, RT 4623.

any warning.[42]

f. Because the victim had children,[43] or because the victim had not yet had a chance to have children.[44]

g. Because the victim struggled prior to death,[45] or because the victim did not struggle.[46]

h. Because the defendant had a prior relationship with the victim,[47] or because the victim was a complete stranger to the defendant.[48]

41. Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of factors inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim

---

[42] *See, e.g., People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[43] *See, e.g., People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[44] *See, e.g., People v. Carpenter*, No. S004654, RT 16752 (victim had not yet had children).

[45] *See, e.g., People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[46] *See, e.g., People v. Fauber*, No. S005868, RT 5546-47 (no evidence of struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[47] *See, e.g., People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish,* 52 Cal.3d 648, at 717 (1990).

[48] *See, e.g., People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

was a child, an adolescent, a young adult, in the prime of life, or elderly.[49]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[50]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge or for no motive at all.[51]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in

---

[49] *See, e.g., People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10075 (victims were adolescents, ages 14, 15, and 17); *People v. Carpenter*, No. S004654, RT 16752 (victim was 20); *People v. Phillips*, 41 Cal.3d 29, 63, 711 P.2d 423, 444 (1985) (26-year-old victim was "in the prime of life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was elderly").

[50] *See, e.g., People v. Clair*, No. S004789, RT 2474-45 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S01723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[51] *See, e.g., People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10544 (no motive at all).

the middle of the day.[52]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[53]

42. The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever.

43. Juries consider, and prosecutors have been permitted to turn, entirely opposite facts or facts that are inevitable variations of every homicide, into aggravating factors which the jury is urged to weigh on death's side of the scale.

44. As noted above, California's scheme is particularly death-biased in felony-murder cases because the California felony-murder rule itself is exceedingly broad.

45. Additionally, pursuant to Penal Code §190.3(a), a California penalty phase jury is instructed to weigh in aggravation of sentence any special circumstance which it found true at the guilt phase. (Penal Code §190.3(a); CALJIC 8.84.1). After a first degree murder conviction and special circumstance finding based on felony-murder, the penalty phase jury is instructed to weigh the same felony-murder "crime circumstances" (Penal Code §190.3(a)) and the same felony-murder special circumstance(s) as factors in

---

[52] *See, e.g., People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[53] *See, e.g., People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16749-50 (forested area); *People v. Comtois*, No S017116, RT 29760 (remote, isolated location).

aggravation. Thus, a defendant convicted of first degree murder under a felony-murder theory is therefore automatically eligible for a duplicating special circumstance (Penal Code §190.2(a)(17) *et seq.*) and a duplicating penalty phase aggravating factor (Penal Code §190.3(a)), by the nature of the charge.

46. By contrast, a defendant accused of a premeditated killing does not automatically have a built-in special circumstance. Something more must be found to make that defendant eligible for death, and to support a sentencer's decision to impose death. This disparity between premeditated and felony-murder is highly incongruous, and violates the due process guarantees of the Eighth and Fourteenth Amendments, as well as the Fourteenth Amendment's equal protection clause and the California Constitution.

47. California's effort to comply with the Eighth Amendment's narrowing requirement by means of findings of special circumstances does nothing meaningfully to narrow the class of murderers eligible for death because the special circumstance of a felony-murder duplicates exactly the elements of the crime itself. The error is then emphasized by having the jury consider the special circumstance finding as a penalty phase aggravating factor. Because the substantive felony-murder offense (Penal Code §189), the felony-murder special circumstance and the penalty phase aggravating factor based on the special circumstance used in the actual decision to impose death are all duplicative, a death judgment which, as here, is based on such factors also violates the Fifth Amendment's prohibition against double jeopardy. This triple use of facts in a capital case felony-murder also violates the Eighth Amendment's prohibition against cruel and unusual punishment, the Fourteenth Amendment's due process clause and the enhanced capital case due process protection of both. This is a process biased in favor of death that does not genuinely narrow the pool of murderers to those most deserving of death.

48. The California murder and death penalty statutory scheme, contained in Penal Code §§187-190.5, affords the individual prosecutor complete discretion to determine

whether special circumstances will be charged and whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments, thereby creating a substantial risk of county-by-county arbitrariness. There are no statewide standards to guide the prosecutor's discretion.

49. Some offenders, under the California statutory scheme, are chosen as candidates for the death penalty by one prosecutor, while others with similar factors in different counties are not. This arbitrary determination can be made at the charging stage, prior to trial, after the guilt phase, and during or even after the penalty phase. This range of opportunity, coupled with the absence of any standards to guide the prosecutor's discretion, permits reliance on constitutionally irrelevant and impermissible considerations, including race, ethnicity, sexual orientation or economic status. Additionally, the prosecutor is free to seek death in virtually every first degree murder case on either a lying-in-wait theory or a felony-murder theory and to argue that death should be imposed based on nothing more than the same facts that substantiated a conviction for first degree murder.

50. Petitioner would not have been charged with the death penalty had he been charged with the same crimes in many other counties in California. The California statutory scheme, by design and in effect, improperly produced arbitrary and capricious prosecutorial discretion throughout the capital case process, in charging, prosecuting, submitting the case to the jury and opposing the automatic motion to modify the sentence.

51. In addition to its failure to genuinely narrow the class of death-eligible defendants and its provision of unfettered charging discretion to individual prosecutors, the California murder/death penalty statutory scheme, as written and applied, contains none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances outweigh the mitigating circumstances and

that death is the appropriate penalty. Not only is inter-case proportionality review not required, it is not permitted.

52. Other jurisdictions that allow the death penalty to be imposed have at least one of these safeguards, in order to avoid the imposition of random or vindictive death sentences. None is a part of California's death penalty law.

53. Twenty-five states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution and three additional states have related provisions.[54] Only California and four other states (Florida, Missouri, Montana and New Hampshire) fail to address the matter by statute.

54. California does not require that a reasonable doubt standard be used to determine whether a death sentence should be imposed. However, this heightened standard is employed for matters of much less importance to an individual than life or death, i.e., being committed to a mental hospital or having a conservator appointed to manage his or her affairs. In fact, California's failure to provide any standard of proof for aggravating or

---

[54] See Ala. Code §13A-5-45(e) (1975); Ark. Code Ann. §5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. §16-11-103(d) (West 1992); Del. Code Ann. tit. 11, §4209(d) (1) (a) (1992); Ga. Code Ann. §17-10-3-(c) (Harrison 1990); Idaho Code §19-2515(g) (1993); Ill. Ann. Stat., ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. §532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §413(d), (f), (g) (1957); Miss. Code Ann. §99-19-103 (1993); *State v. Stewart*, 250 N.W.2d 849, 863 (Neb. 1977); *State v. Simants*, 250 N.W.2d 881, 888-890 (Neb. 1977); Nev. Rev. Stat. Ann. §175.554(3) (Michie 1992); N.M. Stat. Ann. §31-20A-3 (Michie 1993); Ohio Rev. Code §2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, §701.11 (West 1993); 42 Pa. Cons. Stat. Ann. §9711(c)(1)(iii) (1982); S.C. Code Ann. §16-3-20(A), (c) (Law Co-op 1992); S.D. Codified Laws Ann. §23A-27A-5 (1988); Tenn. Code Ann. §39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. §37.071(c) (West 1993); *State v. Pierre*, 572 P.2d 1338, 1348 (Utah 1977); Va. Code Ann. §19.2-264.4(c) (Michie 1990); Wyo. Stat. §6-2-102(d)(I)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. 10.95.060(4) (West 1990).) Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. §13-703(c) (West 1989); Conn. Gen. Stat. Ann. §53a-46a(c) (West 1985).)

mitigating circumstances or the weighing process and failure to assign such a burden to either party, is an additional unconstitutional failure of the statute.

55. Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[55] A fourth state, Utah, has reversed a death judgment because that judgment was based on the same standard of proof as applied in California, i.e., less than proof beyond a reasonable doubt.

56. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[56]

57. Of the twenty-two states like California that vest the responsibility for death penalty sentencing on the jury, however, fourteen require that the jury unanimously agree on the aggravating factors proven and unanimously agree that death is the appropriate

---

[55] See Ark. Code. Ann. §5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. §10.95.060 (West 1990); and *State v. Goodman*, 257 S.E.2d 569, 577 (1979).

[56] See Ala. Code §12A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. §13-703 (D) (1989); Ark. Code Ann. §5-4-603 (a) (Michie 1987); Conn. Gen. Stat. Ann. §53a-46a(e) (West 1985); *State v. White*, 395 A.2d 1082, 1090 (Del. 1978); Fla. Stat. Ann. §921.141(3) (West 1985); Ga. Code Ann. §17-10-30(c) (Harrison 1990); Idaho Code §19-2515(e) (Michie 1987); Ky. Rev. Stat. Ann. §532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code, art. 27, §413(I) (1992); Miss. Code Ann. §99-19-103 (1993); Mont. Code Ann. §46-18-306 (1993); Neb. Rev. Stat. §29-2522 (1989); Nev. Rev. Stat. Ann. §175-554(3) (Michie 1992); N.H. Rev. Stat. Ann. §630:5 (IV) (1992); N.M. Stat. Ann. §31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, §701.11 (West 1993); 42 Pa. Cons. Stat. Ann. §9711 (1982); S.C. Code §16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. §23A-27A-5 (1988); Tenn. Code Ann. §39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. §37.071(c) (West 1993); Va. Code Ann. §19.2-264.4(D) (Michie 1990); Wyo. Stat. §6-2-102(e) (1988).

sentence[57]. California does not have such a requirement.

58. Petitioner's jurors were never told that they were required to agree on which factors in aggravation had been proven. They could have made their decision to impose death using any of the improper considerations described *ante*, or still other similar, improper matters. Absent a requirement of unanimous jury agreement as to the existence of any aggravating factors, and written findings thereon, the propriety of the judgment cannot be reviewed in a constitutional manner. Each juror could have relied on a factor which could potentially constitute proper aggravation but was different from such factors relied on by the other jurors; i.e., there was no actual agreement on why petitioner should be condemned.

59. Thirty-one of the thirty-four states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the state supreme court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. §27-2537(c).) The provision was approved by the Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* . . ." *Gregg v. Georgia*, at 198. Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." *Proffitt v. Florida,* 428 U.S. 242, 259 (1976). Twenty states have statutes similar to that of Georgia and seven have judicially

---

[57] See Ark. Code Ann. §5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. §16-11-103(2) (West 1992); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann., art. 905.6 (West 1993); Md. Ann. Code, art. 27, §413(I) (1993); Miss. Code Ann. §99-19-103 (1992); N.H. Rev. Stat. Ann. §630:5(IV) (1992); N.M. Stat. Ann. §31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, §701.11 (West 1993); 42 Pa. Cons. Stat. Ann. §9711(c)(1)(iv) (1982); S.C. Code Ann. §16-3-20(c) (Law. Co-op. 1992); Tenn. Code Ann. §39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. §37.071 (West 1993).

instituted similar review.[58]

60. Penal Code §190 does not require that either the trial court or this Court undertake a comparison between this and other factually similar cases to examine the proportionality of the sentence imposed, i.e., inter-case proportionality review. The statute also does not forbid such review. This Court has made it clear, however, that neither trial courts nor reviewing courts are permitted in California to do inter-case proportionality review. This blanket prohibition on the consideration of any evidence showing that death sentences are not being charged by California prosecutors or imposed on similarly situated defendants by California juries, regardless of the circumstances of a particular case, violates the Constitution.

61. Because almost all first degree murders in California fall within the special circumstances enumerated in Penal Code §190.2, the individual prosecutors in California are afforded complete discretion to determine whether to charge special circumstances and seek penalties of death and the California statutory scheme contains none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death, California's death penalty statute fails to genuinely narrow the class of

---

[58] See Ala. Code §13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. §53a-46(b)(3) (West 1993); Del. Code Ann., tit. 11, §4209(g)(2) (1992); Ga. Code Ann. §17-10-35(c)(3) (Harrison 1990); Idaho Code §19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. §532.075(3) (Michie 1985); La. Code Crim. Proc. Ann., art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. §99-19-105(30(c) (1993); Mont. Code Ann. §46-18-310(3) (1993); Neb. Rev. Stat. §29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. §177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. §630:5(XI)(c) (1992); N.M. Stat. Ann. §31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. §15A-2000(d)(2) (1983); Ohio Rev. Code Ann. §2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. §9711(h)(3)(iii) (1993); S.C. Code Ann. §16-3-25(C)(3) (1988); Tenn. Code Ann. §13-206(c)(1)(D) (1993); Va. Code Ann. §17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. §10.95.130(2)(b) (West 1990); Wyo. Stat. §6-2-103(d)(iii) (1988). Also see *State v. Dixon* (Fla. 1973) 283 So. 2d 1, 10; *Alford v. State* (Fla. 1975) 307 So. 2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E. 2d 181, 197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890; *State v. Richmond* (Ariz. 1976) 560 P.2d 41, 51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.

death eligible murderers in violation of the Eighth and Fourteenth Amendments and permits the imposition of death sentences in an arbitrary and capricious manner.

62. Because petitioner was prosecuted under this overly-inclusive and unconstitutional statute, his death sentence is invalid and a writ of habeas corpus should issue reversing his penalty.

63. The failure of petitioner's counsel to object to prosecution of petitioner under the California capital sentencing law for the reasons set forth above was unreasonable, fell below the prevailing professional standard of competence, was not justified and could not have been justified, by any legitimate tactical objective, denied petitioner his right to a reliable penalty determination, precluded review of this issue on appeal and prejudiced petitioner's chances of obtaining a more favorable sentence.

5. EIGHTH AMENDMENT CLAIMS.

CLAIM 131: The Unconstitutional Use of Lethal Injection Renders Petitioner's Death Sentence Illegal.

1. Petitioner's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments as well as the California Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition of cruel and unusual punishment. In 1992, California added as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." (Penal Code §3604.) As amended in 1992, Penal Code §3604 provides that "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection." As amended, §3604 further provides that "if either manner of execution . . . is held invalid, the punishment of death shall be imposed by the alternate means . . . ."

2. In 1996, the California Legislature amended Penal Code §3604 to provide that "if a person under sentence of death does not choose either lethal gas or lethal injection . . ., the penalty of death shall be imposed by lethal injection."

3. On October 4, 1994, the United States District Court for the Northern District of California ruled in *Fierro v. Gomez*, 865 F.Supp. 1387 (N.D. Cal. 1994) that the use of lethal gas is cruel and unusual punishment and thus violates the constitution. In 1996, the Ninth Circuit affirmed the district court's conclusions in *Fierro*, holding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." *Fierro v. Gomez,* 77 F.3d 301, 309 (9th Cir. 1996). The Ninth Circuit also permanently enjoined the state of California from administering lethal gas. *Ibid.* Accordingly, lethal injection is the only method of execution currently authorized in California.

4. In 1996, the Ninth Circuit concluded, in *Bonin v. Calderon*, 77 F.3d 1155, 1163 (9th Cir. 1996), that because the use of lethal gas has been held invalid by the Ninth Circuit, a California prisoner sentenced to death has no state-created constitutionally protected liberty interest to choose his method of execution under Penal Code §3604(d). Under operation of California law, the Ninth Circuit's invalidation of the use of lethal gas as a means of executions leaves lethal injection as the sole means of execution to be implemented by the state. *(Ibid.*; see Penal Code §3604(d)). Because Bonin did not argue that execution by lethal injection is unconstitutional, the Ninth Circuit concluded, with no discussion nor analysis, that the method of execution to be implemented in his case was applied constitutionally. *(Ibid.)*

5. The lethal injection method of execution is authorized to be used in thirty-one states in addition to California. Between 1976 and 1996, there were 179 executions by lethal injection. This figure includes all lethal injection executions in the United States through January 22, 1996. Of the 56 people executed in the United States in 1995, only

seven died by other means. Lethal injection executions have been carried out in at least the following states: Arizona, Arkansas, Delaware, Idaho, Illinois, Louisiana, Maryland, Missouri, Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia and Wyoming.

6. Consequently, there is a growing body of evidence, both scientific and anecdotal, concerning these methods of execution, the effects of lethal injection on the inmates who are executed by this procedure and the many instances in which the procedures fail, causing botched, painful, prolonged and torturous deaths for these condemned persons.

7. Both scientific evidence and eyewitness accounts support the proposition that death by lethal injection can be an extraordinarily painful death and that it is therefore in violation of the prohibition against cruel and unusual punishment set forth in the Eighth Amendment. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

8. The drugs authorized to be used in California's lethal injection procedure are extremely volatile and can cause complications even when administered correctly. The procedure exposes the inmate to substantial and grave risks of prolonged and extreme infliction of pain if these drugs are not administered correctly.

9. Medical doctors are prohibited from participating in executions on ethical grounds. The Code of Medical Ethics was set forth in the Hippocratic Oath in the fifth century B.C. and requires the preservation of life and the cessation of pain above all other values.[59] Medical doctors may not help the state kill an inmate.[60] The American Nurses

---

[59] The Oath provides: "I will follow the method of treatment which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, nor suggest any such counsel."

[60] During the American Medical Association's annual meeting in July 1980, their House of Delegates adopted the following resolution: "A physician, as a member of a profession dedicated to the preservation of life when there is hope of doing so, should not be a participant in a legally authorized

Association also forbids members from participating in executions.

10. The first lethal injection execution in the United States took place in 1982 and was plagued by mishaps from the outset. Because of several botched executions, the New Jersey Department of Corrections contacted an expert in execution machinery and asked him to invent a machine to minimize the risk of human error. Fred Leuchter's lethal injection machine, designed to eliminate "execution glitches," was first used on January 6, 1989 for an execution in Missouri.

11. The dosages to be administered are not specified by statute but rather "by standards established under the direction of the Department of Corrections." (Penal Code §3604(a).) The three drugs commonly used in lethal injections are Sodium Pentothal, Pancuronium Bromide and Potassium Chloride. See SEPHC Ex. 30 at 3.

12. The Sodium Pentothal renders the inmate unconscious. The Pancuronium Bromide then paralyzes the chest wall muscles and diaphragm so that the subject can no longer breathe. Finally, the Potassium Chloride causes a cardiac arrhythmia which results in ineffective pumping of blood by the heart and, ultimately, a cardiac arrest.

13. The procedures by which the State of California plans to inject chemicals into the body are so flawed that the inmate may not be executed humanely, so as to avoid cruel and unusual punishment.

14. Death by lethal injection involves the selection of chemical dosages and combinations of drugs by untrained or improperly skilled persons. Consequently, non-physicians are making medication dosing decisions and prescriptions that must otherwise be made by physicians under the law.

15. Since medical doctors may not participate or aid in the execution of a human being on ethical grounds, untrained or improperly skilled, non-medical personnel are

---

execution. [However, a] physician may make a determination or certification of death as currently provided by law in any situation."

making what would ordinarily be informed medical decisions concerning dosages and combinations of drugs to achieve the desired result. The effects of the lethal injection chemicals on the human body at various dosages are medical and scientific matters and properly the subject of medical decision-making. Moreover, the efficacy of the drugs will vary on different individuals depending on many factors and variables, which would ordinarily be monitored by medical personnel.

16. There is a risk that the dosages selected by untrained persons may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons and may inflict unnecessarily extreme pain and suffering.

17. There is a risk that the order and timing of the administration of the chemicals would greatly increase the risk of unnecessarily severe physical pain and mental suffering.

18. The desired effects of the chemical agents to be used for execution by lethal injection in California may be altered by inappropriate selection, storage and handling of the chemical agents.

19. Improperly selected, stored and/or handled chemicals may lose potency and thus fail to achieve the intended results or inflict unnecessary, extreme pain and suffering in the process.

20. Improperly selected, stored, and/or handled chemicals may be or become contaminated, altering the desired effects and resulting in the infliction of unnecessary, extreme pain and suffering. California provides inadequate controls to ensure that the chemical agents selected to achieve execution by lethal injection are properly selected, stored and handled.

21. Since medical doctors cannot participate in the execution process, non-medical personnel will necessarily be relied upon to carry out the physical procedures

required to execute petitioner.

22. These non-medical technicians may lack the training, skill and experience to effectively, efficiently and properly prepare the apparatus necessary to execute petitioner, prepare petitioner physically for execution, ensure that he is restrained in a manner that will not impede the flow of chemicals and result in a prolonged and painful death, insert the intravenous catheter properly in a healthy vein so that chemicals enter the blood stream and not infiltrate surrounding tissues and administer the intravenous drip properly so that unconsciousness and death follow quickly and painlessly.

23. Inadequately skilled and trained personnel are unequipped to deal effectively with any problems that arise during the procedure. They may fail to recognize problems concerning the administration of the lethal injection. Once problems are recognized, these untrained personnel may not know how to correct the problems or mistakes. Their lack of adequate skill and training may unnecessarily prolong the pain and suffering inherent in an execution that goes awry.

24. The use of unskilled and improperly trained technicians to conduct execution by lethal injection and the lack of adequate procedures to ensure that such executions are humanely carried out have resulted in the unwarranted infliction of extreme pain, resulting in a cruel, unusual and inhumane death for the inmate in numerous cases across the United States in recent years.

25. In 1982, Charles Brooks of Texas was the first person executed by lethal injection in the United States. The Warden of the Texas prison reportedly mixed all three chemicals into a single syringe. The chemicals had precipitated; thus, the Warden's initial attempt to inject the deadly mixture into Brooks failed.

26. On March 13, 1985, Steven Peter Morin laid on a gurney for forty-five minutes while his Texas executioners repeatedly pricked his arms and legs with a needle in search of a vein suitable for the lethal injection. (Michael Graczyk, *Convicted Killer in*

Texas Waits 45 Minutes Before Injection is Given, Gainesville Sun, March 14, 1985; *Murderer of Three Women is Executed in Texas,* New York Times, March 14, 1985). Problems with the execution prompted Texas officials to review their lethal injection procedures for inmates with a history of drug abuse. (*Ibid.)*

27. Over a year later, on August 20, 1986, Texas officials experienced such difficulty with the procedure that Randy Wools had to help his executioners find a good vein for the execution. (*Texas Executes Murderer,* Las Vegas Sun, August 20, 1986).

28. Similarly, on June 24, 1987, in Texas, Elliot Johnson laid awake and fully conscious for thirty-five minutes while Texas executioners searched for a place to insert the needle.

29. On December 13, 1988, in Texas, Raymond Landry was pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the execution, the syringe came out of Landry's vein, spraying the deadly chemicals across the room towards witnesses. The execution team had to reinsert the catheter into the vein. The curtain was pulled for 14 minutes so witnesses could not observe the intermission. (Michael Graczyk, *Landry Executed for '82 Robbery Slaying,* Dallas Morning News, December 13, 1988; and Michael Graczyk, *Drawn-Out Execution Dismays Texas Inmates,* Dallas Morning News, December 15, 1988).

30. On May 24, 1989, in Huntsville, Texas, Stephen McCoy had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnessed the execution, thought the fainting would catalyze a chain reaction among the witnesses. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding, "The drugs might have been administered in a heavier dose or more rapidly." (*Man Put to Death for Texas*

Murder, The New York Times, May 25, 1989; *Witnesses to an Execution,* Houston Chronicle, May 27, 1989).

31. On January 24, 1992, in Varner, Arkansas, it took the medical staff more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were not permitted to view this scene but reported hearing Rector's loud moans throughout the process. During the ordeal Rector, who suffered serious brain damage from a lobotomy, tried to help the medical personnel find a patent vein. The administrator of the State's Department of Corrections Medical Programs said, paraphrased by a newspaper reporter, "the moans came as a team of two medical people, increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. (Joe Farmer, *Rector, 40, Executed for Officer's Slaying,* Arkansas Democrat-Gazette, January 25, 1995; Sonja Clinesmith, *Moans Pierced Silence During Wait,* Arkansas Democrat-Gazette, January 26, 1992).

32. On March 10, 1992, in McAlester, Oklahoma, Robyn Lee Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. *Tulsa World* reporter, Wayne Greene said, "The death looked scary and ugly." *(Witnesses Comment on Parks' Execution,* Durant Democrat, March 10, 1992; *Dying Parks Gasped for Life,* The Daily Oklahoman, March 11, 1992; *Another U.S. Execution Amid Criticism Abroad*, New York Times, April 24, 1992).

33. On April 23, 1992, Billy Wayne White died 47 minutes after his executioners strapped him to the gurney in Huntsville, Texas. White tried to help prison officials as they struggled to find a vein suitable to inject the killing drugs. (*Man Executed in '76 Slaying After Last Appeals Rejected*, Austin (Tex) American-Statesman, April 23,

1992; *Killer Executed by Lethal Injection*, Gainesville Sun, April 24, 1992; Michael Graczyk, *Veins Delay Execution 40 Minutes*, Austin American Statesman, April 24, 1992; Kathy Fair, *White Was Helpful at Execution*, Houston Chronicle, April 24, 1992).

34. On May 7, 1992, in Texas, Justin Lee May had a violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the *Item* in Huntsville, Texas, May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze...." Associated Press reporter Michael Graczyk wrote, "He went into a coughing spasm, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back, if he had not been belted down. After he stopped breathing, his eyes and mouth remained open." (Michael Graczyk, *Convicted Texas Killer Receives Lethal Injection*, (Plainview, Texas) Herald, May 7, 1992; *Convicted Killer May Dies*, (Huntsville, Texas) Item, May 7, 1992; *Convicted Killer Dies Gasping*, San Antonio Light, May 8, 1992; Michael Graczyk *Convicted Killer Gets Lethal Injection*, (Denison, Texas) Herald, May 8, 1992).

35. On May 10, 1994, in Illinois, after the execution had begun, one of the three lethal drugs used to execute John Wayne Gacy clogged the tube, preventing the flow of the drugs. Blinds were drawn to block the scene, thereby obstructing the witnesses' view. The clogged tube was replaced with a new one, the blinds were reopened and the execution resumed. Anesthesiologists blamed the problem on the inexperience of prison officials who conducted the execution. Doctors stated that the proper procedure taught in "IV 101" would have prevented this error. (Rob Karwath and Susan Kuczka *Gacy Execution Delay Blamed on Clogged T.B. Tube*, Chicago Tribune, Page 1, May 11, 1994).

36. On May 3, 1995, Emmitt Foster was executed by the State of Missouri. Foster was not pronounced dead until 29 minutes after the executioners began the flow of lethal chemicals into his arm. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit the witnesses' view. Executioners finally reopened the blinds three

minutes after Foster was pronounced dead. According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. The coroner believed that the tightness stopped the flow of chemicals into the veins. Several minutes after the strap was loosened, death was pronounced. The coroner entered the death chamber 20 minutes after the execution began, noticed the problem and told the officials to loosen the strap so that the execution could proceed.

37. The Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. *Cf. Estelle v. Gamble*, 429 U.S. 97, 106 (1976). As illustrated in the above accounts and as will be demonstrated in detail at an evidentiary hearing, following discovery, investigation and other opportunities for full development of the factual basis for this claim, there are a number of known risks associated with the lethal injection method of execution and the State of California has failed to take adequate measures to ensure against those risks.

38. The Eighth Amendment safeguards nothing less than the dignity of man and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. Under *Trop v. Dulles*, 356 U.S. 86, 100 (1958), the Eighth Amendment stands to safeguard "nothing less than the dignity of man."

39. To comply with constitutional requirements, the State must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. *Glass v. Louisiana*, 471 U.S. 1080, 1086 (1985); *Campbell v. Wood*, 18 F.3d 662, 709-711 (9th Cir. 1994) (Reinhart, J., dissenting); *see also, Zant v. Stephens*, 462 U.S. 862, 884-85 (1985) [state must minimize risks of mistakes in administering capital punishment]; *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) [same].

40. It is impossible to develop a method of execution by lethal injection that will work flawlessly in all persons given the various individual factors which have to be assessed

in each case. Petitioner should not be subjected to experimentation by the State in its attempt to figure out how best to kill a human being.

41. California's use of lethal injection to execute prisoners sentenced to death unnecessarily risks extreme pain and inhumane suffering. Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency and violates the Eighth Amendment.

42. The Eighth Amendment prohibits methods of execution that involve the "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, at 173. Petitioner's sentence must be reversed.

CLAIM 132: Execution of Petitioner after Prolonged Confinement Violates the Eighth Amendment Prohibition of Cruel and Unusual Punishment.

1. Execution of petitioner after his prolonged confinement under a sentence of death would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

2. Petitioner was sentenced to death in January, 1980. Petitioner was then 34 years old. He was confined under a sentence of death until 1985, when his sentence was reversed. Petitioner was again sentenced to death in 1987 and has been confined under that sentence up to the present.

3. In 1987, at age 42, petitioner again arrived on California's death row at San Quentin State Prison. There he lives among almost well over 600 other condemned inmates.

4. Today, petitioner is 58 years old. He has lived under a sentence of death for over twenty years (excepting the period of time for his retrial, when capital charges were pending but no sentence was in effect). Petitioner lives in a solitary cell, a 4 ½ ' by 10 ½ ' concrete box, consisting of three concrete walls and a fourth wall of metal bars and mesh screen. Petitioner cannot see other prisoners through the barred wall; he can, however,

hear the incessant din of prisoners yelling and guards using loudspeakers. Both in and out of his cell, he is under surveillance by one or more guards armed with loaded weapons. Petitioner eats his meals in his cell and is restricted in the amount and type of personal property that he is permitted to possess. His time outside his cell is restricted and, whenever he is transported to another location, he is handcuffed.

5. San Quentin has failed to provide adequate mental health treatment for petitioner's longstanding mental illness.

6. Execution of petitioner following such confinement under his sentence of death for this lengthy a period of time constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari); *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998) (Fletcher, J., dissenting from order denying stay of execution). If petitioner is executed, his sentence will be more than seventeen years of solitary confinement in a tiny cell in the most horrible portion of prison – death row – followed by execution.

7. Carrying out petitioner's death sentence after this extraordinary delay is violative of the Eighth Amendment's punishments clause in two respects:

a. It constitutes cruel and unusual punishment to confine an individual, such as petitioner, on death row for this extremely prolonged period of time. *See, e.g., McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995); *Ceja v. Stewart*, (Fletcher, J., dissenting from order denying stay of execution).

b. After the passing of such a period of time since his conviction and judgment of death, the imposition of a sentence of death upon petitioner would violate the Eighth Amendment because the State's ability to exact retribution and to deter other serious offenses by actually carrying out such a sentence is drastically diminished. *Ceja v. Stewart*, (Fletcher, J., dissenting from order

denying stay of execution).

8. As for the first basis supporting this claim, confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as the extreme physical and social restrictions that inhere in life on death row; accordingly, such confinement, in and of itself, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

9. Over a century ago, the Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890).

10. In *Medley*, the period of uncertainty was just four weeks. As recognized by Justice Stevens, *Medley's* description should apply with even greater force in a case such as this, involving a delay that has lasted sixteen years. *Lackey v. Texas*, 514 U.S. 1045 (Stevens, J., joined by Breyer, J., regarding the denial of certiorari).

11. This Court reached a similar conclusion in *People v. Anderson*, 6 Cal.3d 628, 649 (1972):

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

12. As for the second basis supporting this claim, the penological justification for carrying out an execution disappears when an extraordinary period of time has elapsed between the conviction and the proposed execution date, and actually executing a defendant under such circumstances is an inherently excessive punishment that no longer serves any legitimate purpose. *Ceja v. Stewart*; *see also Furman v. Georgia*, at 312 (White, J., concurring).

13. The imposition of a sentence of death must serve legitimate and substantial penological goals in order to survive Eighth Amendment scrutiny. When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Id.,* at 312 (White, J., concurring); *see also Gregg v. Georgia*, at 183 ("The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering").

14. In order to survive Eighth Amendment scrutiny, "the imposition of the death penalty must serve some legitimate penological end that could not otherwise be accomplished. If 'the punishment serves no penal purpose more effectively than a less severe punishment,' (*Furman v. Georgia*, at 280 (Brennan, J., concurring)), then it is unnecessarily excessive within the meaning of the Punishments Clause." *Ceja v. Stewart.*

15. The penological justifications that can support a legitimate application of the death penalty are twofold: "retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, at 183. Retribution, as defined by the Supreme Court, means the "expression of society's moral outrage at particularly offensive behavior." *(Ibid.)*

16. The ability of the State of California to further the ends of retribution and deterrence has been drastically diminished here as a result of the extraordinary period of time that has elapsed since the date of Petitioner's conviction and judgment of death. *See Lackey v. Texas*; *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J. respecting denial of cert.).

17. Because it would serve no legitimate penological interest to execute petitioner after this passage of time and because petitioner's confinement on death row for

over two decades, in and of itself, constitutes cruel and unusual punishment, execution of petitioner is prohibited by the Eighth Amendment's Punishments Clause.

18. Petitioner's conduct while in prison awaiting execution of his death sentence demonstrates that a sentence of life without parole, rather than death, is the only appropriate punishment for petitioner under the Eighth and Fourteenth Amendments. *See, e.g., People v. Warren*, 179 Cal.App.3d 676 (1986).

6. INTERNATIONAL LAW CLAIMS.

CLAIM 133: Application of the Death Penalty Violates International Law Under the United States's Treaty Obligations.

1. In the United States, treaties become law when they are ratified. A prerequisite to ratification is the advice and consent of two-thirds of the Senate. Once ratified, a treaty is binding law under the Supremacy Clause (U.S Const. Art. VI, §§ 2):

> [A]ll Treaties made. . .under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Since 1945, the international community has adopted several treaties that focus on the rights of individuals. There are three documents, in particular, that are collectively referred to as the "International Bill of Rights:" (1) the Universal Declaration of Human Rights; (2) the International Covenant on Economic, Social, and Cultural Rights; and (3) the International Covenant on Civil and Political Rights (with its two Optional Protocols).

3. The International Covenant on Civil and Political Rights ("ICCPR") was adopted by the United Nations General Assembly on December 16, 1966 and entered into force on March 23, 1976. The ICCPR was adopted by the United States on September 8, 1992 when the United States instrument of ratification was deposited with the United Nations. The ICCPR is part of the "supreme Law of the Land" under the Constitution.

4. Article 6 of the ICCPR guarantees that "no one shall be arbitrarily deprived

of his life" and:

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the laws in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment on the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

5. The death penalty as imposed in this case constitutes the arbitrary deprivation of life in violation of Article VI, Section 1 of the ICCPR.[61] There is no discernible criteria for distinguishing petitioner's case from others in which the accused was sentenced to life without parole. The sweep of the California death penalty is vast– any defendant guilty of first degree murder is death-eligible, due to the all-inclusive list of aggravating factors. Without some method of discerning which cases truly warrant death, the California death penalty is arbitrary in the same way that being struck by lightning is arbitrary.

6. The imposition of the death penalty for felony murder violates Article VI, Section 2 of the ICCPR, which limits the death penalty to only "the most serious crimes." The number of felony murders is large, and fails to narrow the class of death eligible offenses in any appreciable way.

7. The denial of the defendant's right to counsel of his own choosing violates Article 14(3B) of the ICCPR. The relationship between petitioner and trial counsel irrevocably broke down. Based in part on that breakdown, as well as trial counsel's ineffective representation, petitioner was convicted and sentenced to death. Forcing petitioner to endure representation by an attorney with whom petitioner had an irreconcilable conflict violated petitioner's rights under the ICCPR.[62]

---

[61] The Senate has not reserved or otherwise derogated the obligation to refrain from "arbitrary" deprivations.

[62] The Senate issued an "understanding" that this provision does not apply to court-appointed counsel. Assuming arguendo that the Senate can properly make reservations under the separation of powers doctrine, this reservation itself would violate the requirement of full equality of rights regardless

8. Articles 6 and 14 of the ICCPR guarantee the right to a fair trial, including competent counsel at all stages of the proceedings. As discussed above, trial counsel provided ineffective representation. The trial was fundamentally unfair, as discussed in all other claims contained herein.

9. The Senate added a general reservation regarding the death penalty but Article IV, Section 2 of the ICCPR says there can be no derogation from Article VI. Any reservation by the Senate to these provisions is invalid under the separation of powers doctrine. *See, e.g., Clinton v. City of New York*, 524 U.S. 417 (1998) (holding the line-item veto unconstitutional under the separation of powers doctrine because the Constitution does not authorize the President "to enact, to amend or to repeal statutes"); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *see also Foster & Elam v. Neilson*, 27 U.S. (2 Pet. 253 (1829) (holding that the interpretation of treaty provisions is the prerogative of the judicial branch).

10. Only the President has the constitutional authority to make Treaties. U.S. Const. art. II, sec. 2. The Senate may only grant or withhold its consent and is not authorized to limit the scope of treaties. *Id.* Allowing the Senate to change the terms of the treaty would violate the separation of powers doctrine, as it would allow the Senate to make what would be, in effect, a new and different treaty. Nothing in the Constitutional structure suggests that the Senate can simply pick and choose among the provisions of a proffered treaty and give "consent" only to those portions it likes. This would allow the Senate to exercise, in effect, a "line-item veto" over the treaty provisions and "ratify" a treaty that is materially different from the one negotiated with, and accepted by, multiple treaty partners. This is a legislative usurpation of the President's powers and is particularly

---

of economic status as guaranteed in Article 14, Section 3 of the ICCPR.

offensive where the treaty itself prohibits derogation.[63]

11. The Senate, by including the declaration that Articles 1 to 27 are "non-self-executing," has implicitly asserted the power to determine that the treaty provisions bestow no enforceable rights to individuals of the United States, absent enabling legislation. "Whether a treaty is self-executing is an issue for judicial interpretation." *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) citing, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 154 (1) (1965) ("Whether an international agreement of the United States is or is not self-executing is finally determined as a matter of interpretation by courts in the United States if the issue arises in litigation"). Any attempt to require enabling legislation, or labeling a treaty as non-self-executing, is invalid. By requiring such "enabling" legislation, the House of Representatives retains a defacto veto power over the treaty and can keep the treaty from ever taking effect by never enacting the "enabling" legislation. Article II § 2 of the Constitution does not provide that the House of Representatives has a role in the formation of treaties, in fact, they are specifically omitted.

12. By ratifying the treaty made by the President, the Senate gave its consent. Thus, any Senate "reservations," including those stating that the prohibition against cruel, inhuman, or degrading treatment means nothing more than the cruel and unusual punishment

---

[63] Petitioner acknowledges, of course, that the President and the Senate may consider this arrangement convenient and politically desirable. The President may get credit from the international community and domestically for signing significant human rights measures while allowing the Senate to eviscerate its provisions. That allows the United States to strike pious attitudes on the international stage about violations of human rights treaties in other countries while reserving the right to violate international covenants at home. The fact that the legislative and executive branches may want such an arrangement does not mean the Constitution tolerates it. "[T]he hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, 462 U.S. at 951.

prohibited by the Fifth, Eighth and Fourteenth Amendments of the U.S. Constitution,[64] are null and void as unconstitutional violations of U.S. Const. art. II, sec. 2.[65]

13. Any Senate reservations to the ICCPR are invalid, since they are inconsistent with the object and purpose of the treaty. Under the Vienna Convention on the Law of Treaties, a state may not submit a reservation to a treaty obligation if it "is incompatible with the object and purpose of the Covenant." U.N. Doc. A/CONF. 39/27 (1969), at Art. 19(c); *Restatement (Third) of the Foreign Relations of the United States*, §§313(1)(c) Rptr. N.5 (1987). This rule of treaty law has been adopted by the International Court of Justice and the General Assembly. The United Nations Human Rights Committee, in commenting on the U.S. reservations to the ICCPR, has held that they are "incompatible with the object and purpose of the Covenant." Concluding Observations of the Human Rights Committee: United States of America, U.N.Doc. CCPR/C/79/add.50 (1995); *see also* Human Rights Committee, General Comment No.24, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

14. Human rights treaties are different from other treaties in that parties to human rights treaties agree to protect individuals within their jurisdictions, while parties to

---

[64] These reservations have been largely condemned as invalid. *See, e.g.,* William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?,* 21 Brooklyn J. Int''l L. 277 (1995); M. Christian Green, "The Matrioshka Strategy: U.S. Evasion of the International Covenant on Civil and Political Rights," 10 South African Journal of Human Rights 357 (1994); Lawyers Committee for Human Rights, "Statements On U.S. Ratification of the CCPR," 14 Human Rights Law Journal 125 (1993).

[65] Professors Louis Henkin and Richard Wilson have argued that since the Supremacy Clause already deems treaties to be the ""supreme Law of the Land,"" it would be superfluous — and perhaps unconstitutional — to require passage of a federal statute before a treaty takes effect. Louis Henkin, *Comment: U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 A.J.I.L. 341, 346 (1995); Richard J. Wilson, *Defending a Criminal Case with International Human Rights Law*, Champion, May, 2000, at 28. Therefore, any arguments that executing legislation is necessary is similarly flawed.

other treaties agree how to act with respect to each other. The "object and purpose" rule keeps state parties from eliminating important aspects of human rights treaties by making reservations to them, leaving its own citizens as well as other state parties with no recourse. "[T]he true beneficiaries of the agreements are individual human beings, the inhabitants of the contracting states." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (reporters notes at 184) (1987). The "object and purpose" of the International Covenant is to bestow and protect inalienable human rights to citizens. "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." Art. 6 para.1. The right to life is a fundamental human right which is expressed throughout the International Covenant. There is nothing more contravening to the "right to life" than the death penalty.

15. Drafters of international human rights treaties have deemed certain rights so fundamental that they can never be suspended. The RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313(1)(a) (1987) indicates: "A state may enter a reservation to a multilateral international agreement unless reservations are prohibited by the agreement." Article 4 paragraph 1 allows for the derogation of certain provisions of the International Covenant in times of "public emergency which threatens the life of the nation." However, within the substantive provisions of the treaty, a relatively small number of provisions are classified as non-derogable provisions---rights so fundamental and so essential that they brook no exception, even in emergency situations. Article 4 paragraph 2, which the United States did not make a "reservation" to, specifically provides that no derogation may be made to Article 6 (the right to life) ("No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision").

16. The International Covenant established a Human Rights Committee to monitor and report matters relating to the treaty. By ratifying the International Covenant,

and participating in the election of officers to the committee, the United States agreed to the power of the Human Rights Committee to monitor the implementation of and determine non-compliance with, the treaty. In its report issued April 6, 1995, the committee declared the reservations by the U.S. to Article 6, paragraph 5 and Article 7 to be invalid. See Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, 53d Sess., 1413th mtg. para. 14, at 4, U.N. doc. CCPR/C/79/Add.50 (1995). Therefore, the "reservation" the Senate put on Article 6 paragraph 5 has no valid effect and petitioner's death sentence is in violation of the International Covenant.

17. The Senate purported to place a "declaration" on the ratification of the treaty providing that it is "non-self-executing." Given that human rights treaties are by their nature designated to give citizens of a country rights to be free of human rights abuses perpetrated by their own governments, an attempt to make the treaty non-self-executing---and thus to deprive individuals of any means of enforcing it---amounts to a simple remediation of the treaty in the guise of its ratification. The attempt to place this "declaration" on the treaty also violates the separation of powers, by invading the province of the courts. Determining whether the terms of a treaty are self-executing or require legislation to make them effective is clearly a question committed to the judicial branch. *See, e.g., Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985). The Senate's attempt to prevent courts from giving effect to the International Covenant under the Supremacy Clause is inconsistent with the most basic separation of powers principles, that it is the function of the courts to determine the meaning of the law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803). Moreover, it is an open question whether the provisions of a non-self-executing treaty may be invoked as a defense by a private litigant, even if the treaty does not imply an affirmative private cause of action. *See Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Cook v. United States*, 288 U.S. 102 (1933).

18. A treaty entered into by the United States is the law of the land. *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884); *United States v. Rauscher*, 119 U.S. 407, 418 (1886). International agreements of the United States are laws of the United States and supreme over the law of the several states. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1) (1987). The law is clear that if a treaty conflicts with state law, the treaty controls. *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947). "[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. [citation omitted]" *United States v. Pink*, 315 U.S. 203, 230-31 (1942).

19. Therefore, the state of California is bound by the International Covenant and cannot execute petitioner. The failure to guarantee rights under the treaty is, unfortunately, consistent with a pattern of the "lack of awareness of United States International obligations." United Nations, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1998/681 (Add. 3) (1998); see also United Nations, Human Rights Committee, Comments on the United States of America, U.N. Doc. CCPR/79/Add.50 (1995) (the absence of formal mechanisms for the implementation of treaty rights in United States "may lead to a somewhat unsatisfactory application of the Covenant throughout the country").

20. International legal scholars and commentators and Justice O'Connor have also noted the necessity of enforcing international law obligations in the courts of this country:

> I think domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.

Sandra Day O'Connor, *Federalism of Free Nations*, in International Law Decisions in

National Courts 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996). The president has even found it necessary to issue an executive order, adopting a "policy and practice of the Government of the United States" to implement international human rights treaties. Exec. Order No. 13107,- C.F.R.-(December 10, 1998). President Clinton specifically referred to the International Covenant when ordering that the United States fully "respect and implement its obligations under the international human rights treaties[.]"

CLAIM 134: Application of the Death Penalty Violates Customary International Law.

1. Customary international law refers to a set of principles that are so widely accepted by the members of the international community that they have evolved into binding rules of law. Evidence of customary international law includes treaties and conventions, the general usage and practice of nations, judicial decisions, resolutions of international organizations, learned treatises and public declarations by international officials. *See United States v. Smith*, 18 U.S. (5 Wheat) 153, 160-61 (1820); *see also* Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945).

2. Customary international law is akin to international common law. The Supreme Court has recognized that:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

The Paquete Habana, 175 U.S. 677, 700 (1900).

3. Customary international law has been a part of federal law since our country was established. When Justice Jay stated that "the United States by taking a place among the nations of the earth [became] amenable to the law of nations," he was speaking of customary international law, not merely the treaties the U.S. would one day make. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *see Ware v. Hylton*, U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence they were bound to

receive the law of nations...."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2nd Cir. 1980) ("upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law"). Even the obligations to obey future treaties stemmed from the customary international law principle of *pacta sunt survaneda* ("Promises are to be kept").

4. "[I]t is now established that customary international law in the United States is a kind of federal law, and like treaties and other international agreements, it is accorded supremacy over state law by Article VI of the Constitution." Henkin et al., International Law, Cases and Materials, 164 (3d ed. 1993); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (finding international law to be federal law). "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (3); see also § 102 comment (i). The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF LAW also provides that "an agreement among a large number of parties may give rise to a customary rule of international law binding on non-party states." *Id.* at § 8

5. Federal courts of appeals have held that customary international law which has attained the stature of *jus cogens* is legally binding on domestic courts. *See United States v. Mata-Ballesteros*, 71 F.3d 754 (9th Cir. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litigation ("Marcos II")*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos Human Rights Litigation ("Marcos I")*, 978 F.2d 493 (9th Cir. 1992); *In re Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, (D.C. Cir 1988); *White v. Paulson*, 997 F.Supp. 1380 (E.D. Wash. 1998).

6. Under the Supremacy Clause, customary international law trumps state law.

Kansas v. Colorado, 206 U.S. 46 (1906); *see Zschernig v. Miller*, 389 U.S. 429, 441 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920).

7. Individuals, including the citizens of the United States, are now understood to possess remediable rights based on international law. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *see generally Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal 1987); Louis Henkin, International Law as Law in the United States, 82 MICH. L. REV. 1555 (1984). The obligations imposed by international common law and the attendant rights granted thereby are owed separately and independently to petitioner.

8. International common law requires that persons facing charges for which capital punishment may be imposed be granted special protections above and beyond the protection afforded in non-capital cases, including competent legal counsel at all stages of the proceedings. As discussed throughout the petition, petitioner's counsel was ineffective throughout the proceedings.

9. The United Nations "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" ("Safeguards") mandate that:

> Capital punishment may only be carried out pursuant to a formal judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

United Nations, Economic and Social Council Resolution (1984/50 May 25, 1984). As discussed above, petitioner's rights under the ICCP were routinely violated.

10. The United Nations Economic and Social Council consider the following state action necessary for implementation of the safeguard:

> Affording special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of the defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.

United Nations, Economic and Social Council Resolution (1989/64 May 25, 1989).

11. The Second Circuit stated that customary international law derives from at least three sources: (1) the work of jurists, "writing professedly on public law;" (2) the general usage and practice of nations; and (3) judicial decisions recognizing and enforcing international law. *Filartiga v. Pena Irala*, 630 F.2d 876, 880 (2d Cir. 1980). A norm of customary international law has binding effect when: (1) most countries adhere to the norm in practice, and (2) those countries follow the norm because they feel obligated to do so by a sense of legal duty. *See* Article 38, Statute of the International Court of Justice, 59 Stat. 1005, 1060 (1945); *Siderman de Blake v. Argentina,* 965 F.2d 699 (9th Cir. 1992). The right to competent counsel, the right to be sentenced to death only for the most serious of crimes (which necessitates some form of proportionality review) and the right to be free from cruel and unusual punishment have all achieved this status. Each was violated during petitioner's trial.

12. As discussed herein and in all other claims, incorporated by reference, rights guaranteed to petitioner by customary international law were violated. These rights were guaranteed over and above those guaranteed by the treaty obligations of the United States. Petitioner is entitled to a reversal of his conviction and sentence.

CLAIM 135: Petitioner's Death Sentence is Arbitrary Under International Law.

1. The right to life is the most fundamental of the human rights contained in the International Bill of Rights. *See, e.g.*, Universal Declaration on Human Rights, GA Res. 217A (III), U.N. GAOR, 3d Sess. art. 3, U.N. Doc. A/810 (1948) ("Everyone has the right to life, liberty, and security of the person"); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174-75 (*entered into force* Mar. 23, 1976) ("Every human being has the inherent right to life"). A number of human rights instruments also provide that a state may not take a person's life "arbitrarily." *See, e.g.*,

ICCPR, art. 6; American Convention on Human Rights, art. 4, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 4 EHRR 417, 21 I.L.M. 58, art. 4. In evaluating "arbitrary arrest and detention" (barred by Art. 9(1) of the ICCPR), the Human Rights Committee, relying on drafting history, concluded that "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

2. The Inter-American Court on Human Rights has addressed the meaning of "arbitrary" executions in an advisory opinion regarding the interpretation of the Vienna Convention on Consular Relations. (OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999)). That Court observed that states may impose the death penalty only if they rigorously adhere to the due process rights set forth in the ICCPR. The court concluded that the execution of a foreign national after his consular notification rights have been violated would constitute an ""arbitrary deprivation of life"" in violation of international law. *Id.* at 76, para. 137. By analogy, the execution of an individual is prohibited as "arbitrary" if a state violates any of the principles contained in the ICCPR. As discussed herein, petitioner's conviction and sentence violate numerous provisions of the ICCPR.

3. Various delegates involved in the drafting of the ICCPR proposed the following definitions of the term ""arbitrary:"" (1) fixed or done capriciously or at pleasure; (2) without adequate determining principle; (3) depending on the will alone; (4) tyrannical; (5) despotic; (6) without cause upon law; and (7) not governed by any fixed rule or standard. Schabas at 76. In *Van Alphen v. The Netherlands*, the Human Rights Committee held that ""arbitrariness"" encompasses notions of inappropriateness, injustice and lack of predictability. (No. 305/1988), U.N. Doc. A/45/40, Vol. II, p. 108, §§5.8; *see also* Daniel Nsereko, *Arbitrary Deprivation of Life: Controls on Permissible Deprivations*, in The Right to Life in International Law 248 (Bertrand Ramcharan, ed., 1985) (deprivation of life is arbitrary if it is done in conflict with international human

rights standards or international humanitarian law).

4. Petitioner's death sentence is arbitrary under any of these criteria. The California statute fails to truly narrow the scope of death eligible offenses. The result is that virtually any first-degree murder satisfies one or more aggravating circumstances. Considering the small percentage of first degree murders which result in death sentences, there is little correlation between the severity of the offenses and the sentence imposed. Consequently, there is no predictability as to when a sentence of death will be rendered. The lack of any proportionality review exacerbates these infirmities. The result is that under whatever standard applied, petitioner's death sentence is arbitrary.

CLAIM 136: Petitioner Has A Right To Be Free From Cruel, Inhuman or Degrading Treatment.

1. Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." When the U.S. Senate ratified the ICCPR, it declared that this phrase meant ""the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States."" International tribunals, however, have interpreted this provision more broadly. As discussed above, the Senate's reservation violated the separation of powers doctrine. It also violates the purpose of the ICCPR and is, thus, invalid. The United States is thus bound by this provision of the ICCPR. Article 7 prohibits prolonged incarceration on death row (also known as "death row phenomenon"), which constitutes cruel, inhuman, and degrading punishment. See, e.g., the British Privy Council's decision in *Pratt and Morgan v. The Attorney General of Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993)(*en banc*), and the decision of the European Court on Human Rights in *Soering v. United Kingdom,* 11 Eur. Hum. Rts. Rep. 439 (1989) (refusing to extradite a German national to face capital murder charges because of anticipated time that he would have to spend on death row if sentenced to death).

2. In *Pratt and Morgan*, the Privy Council held that a delay of fourteen years between the time of conviction and the carrying out of a death sentence in the case of a Jamaican prisoner was "inhuman punishment." 2 A.C. at 33. In *Soering*, the European Court found that prisoners in Virginia spend an average of six to eight years on death row prior to execution. The court determined that "[h]owever well-intentioned and even potentially beneficial is the provision of the complex post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." 161 Eur. Ct. H.R. (ser. A) at 42 (1989); *see also Vatheeswaran v. State of Tamil Nadu*, 2 S.C.R. 348, 353 (India 1983) (criticizing the "dehumanizing character of the delay" in carrying out the death penalty); *Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General*, No. S.C. 73/93 (Zimb. June 24, 1993 (reported in 14 Hum. Rts. L. J. 323 (1993).

3. Most recently, the Supreme Court of Canada considered evidence that death-sentenced inmates in Washington took, on average, 11.2 years to complete state and federal post-conviction review, in weighing the legality of extraditing two men to the United States to face capital charges. That Court acknowledged a "widening acceptance" that "the finality of the death penalty, combined with the determination of the criminal justice system to satisfy itself fully that the conviction is not wrongful, seems inevitably to provide lengthy delays, and the associated psychological trauma." *Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 March 2001) (at para. 122). Relying in part on this evidence, the court held that the Canadian Charter of Rights and Freedoms precluded the defendants' extradition, absent assurances the United States would not seek the death penalty.

4. Although the lower federal courts have rejected the reasoning in *Pratt and Morgan* and *Soering* (*see, e.g., McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995); *White v. Johnson*, 79 F.3d 432 (5th Cir. 1996)), the Supreme Court has not yet reviewed this

question. At least two Supreme Court justices have written on this precise topic. *See Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari).

5. The norm against cruel, inhuman or degrading treatment is now universally recognized as a violation of international law clearly distinguishable from torture. The Universal Declaration of Human Rights, article 5, provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." Universal Declaration of Human Rights, *adopted* Dec.10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); *see also* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 16, *adopted* Dec.10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doe. A/39/51 (1984) (*entered into force* June 26, 1987); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953); the American Convention on Human Rights, art. 5, *opened for signature* Nov.22, 1969, O.A.S. T.S. No.36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980) (*entered into force* July 18, 1978); the International Covenant on Civil and Political Rights, art. 7, *adopted* Dec.16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717 (*entered into* force Mar. 23, 1976); African Charter on Human and People's Rights, art. 5, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) (*entered into force* Oct.21, 1986).

6. The prohibition against cruel, inhuman or degrading treatment has attained binding force as customary international law. See Declaration of Tehran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, 23 GAOR, U.N. Doc. A/CONF. 32/41 (1968) (noting status of Universal Declaration of Human Rights, including prohibition against cruel, inhuman or degrading treatment, as customary international law);

accord De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985) (noting that the right not to be subjected to cruel, inhuman and degrading treatment constitutes universally accepted international law).

7. Petitioner was originally sentenced to death in 1980. That sentence was reversed for trial errors in 1985. Petitioner was then unconstitutionally sentenced to death again in 1987 and remains on death row today. Petitioner has languished under two error-laden and unconstitutional death sentences for over twenty years. Under international law, this lengthy stay, only achieved through continuing violations of petitioner's rights, violates prohibitions against cruel, inhuman and degrading punishment.

CLAIM 137: Petitioner's Conviction and Sentence Violate His Right to Due Process.

1. Article 14 of the ICCPR enumerates the due process rights relating to criminal proceedings. Specifically, Article 14 provides for the following rights, which were violated during petitioner's trial:

a. Equality before the courts and tribunals– petitioner was not treated equally before his trial courts, due to his indigence. He was denied counsel of choice and instead was forced to suffer with ineffective counsel with whom he had irreconcilable conflicts. These denials were the result of petitioner's indigence, since the trial court would have allowed him to retain new counsel if he had sufficient funds to procure his own counsel.

b. A fair and public hearing by a competent, independent and impartial tribunal– the trial court rendered a multitude of erroneous rulings and instructional errors. The impartiality of the trial court was also put in question by the court's derogatory remarks about homosexuality. (See, e.g., RT 2439, 2724-2730).

c. Presumption of innocence– the presumption of innocence was violated by

the jury's view of petitioner shackled and separated from them in a marked police car. This view conveyed the message to the jurors that petitioner was a dangerous animal who needed to be caged for their protection.

d. To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his choice– as noted above, petitioner was denied counsel of his own choosing. Instead, the trial court forced him to accept representation provided by attorneys Larkin and Carney over petitioner's specific objection.

e. To be tried without undue delay– petitioner's right to a speedy trial was violated. He was initially tried and sentenced in 1980. That verdict and sentence was reversed due to error in 1985. His retrial was held in 1987. This seven year period was a result of error committed by the state and is not attributable to petitioner. Petitioner's rights to a speedy trial were violated. Moreover, had petitioner been tried without undue delay, the difficulties posed by the use of jailhouse informants would not have arisen.

f. To be present during the trial– petitioner's right to be present at trial was violated by his isolation during the jury's view of the Ford Park crime scene. Petitioner was kept away from the jury, caged in a marked police car. He was kept at a distance during the jury's visit to the crime scene and was thus unable to observe the proceedings of hear any conversation which took place.

g. To defend himself in person or through legal assistance of his own choosing and to have legal assistance assigned to him without payment "in any case where the interests of justice so require"– as noted above, petitioner's trial counsel was ineffective. The relationship between counsel and petitioner had broken down irrevocably and the trial court required counsel to remain on the case. Assigning ineffective counsel to an indigent defendant, with whom the

defendant has a severe conflict, fails to protect a defendant's rights.

h. To confront the witnesses against him and obtain the attendance of witnesses on his behalf– petitioner's rights to confront witnesses against him were eviscerated by the trial court's erroneous denial of petitioner's motion to exclude witnesses during testimony. The court's denial of this motion resulted in the ability of the witnesses to orchestrate their testimony and provide artificially consistent testimony after viewing the testimony of other witnesses on related offenses.

i. To review of the conviction and sentence by a higher tribunal– the review process of this Court was fundamentally flawed. As detailed above, petitioner's appellate counsel rendered ineffective assistance of counsel. Moreover, this Court provides institutionally inadequate review of death cases. Its review of petitioner's case in particular was similarly flawed. This Court's review was fundamentally flawed as a result of bias on the part of this Court's former Chief Justice.

j. Not to be prosecuted twice for the same crime– petitioner's rights to be free from multiple prosecutions were violated.

2. Article 6 of the ICCPR provides that the death penalty may only be imposed where these standards are observed. Schabas at 108-09. The Human Rights Committee has held that when a state violates an individual's due process rights under the ICCPR, it may not carry out his execution.. *See, e.g.*, *Johnson v. Jamaica*, No. 588/1994, H.R. Comm. para. 8.9 (1996) (finding delay of 51 months between conviction and dismissal of appeal to be violation of ICCPR art. 14, para. 3(c) and 5, and reiterating that imposition of a death sentence is prohibited where the provisions of the ICCPR have not been observed); *Reid v. Jamaica*, No. 250/1987, H.R. Comm. para. 11.5 ("[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been

respected constitutes [. . .] a violation of article 6 of the Covenant."); *McLawrence v. Jamaica*, No. 702/1996, H.R. Comm. para. 5.13 (1997)(same); OC-16/99, para. 135, Inter-Am. Ct. H.R. (October 1, 1999) ("[s]tates that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases"); Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, *reprinted in* 11 Hum. Rts. L.J. 321 (1990); *Reid v. Jamaica* (No. 250/1987), Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, *reprinted in* 11 Hum. Rts. L.J. 321 (1990); *see Reid v. Jamaica* (No. 250/1987), Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, reprinted in 11 Hum. Rts. L.J. 321 (1990) ("in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial. . . is even more imperative"); G.A. Res. 35/172, Dec. 15, 1980, G.A. Res. 35/172, Dec. 15, 1980, G.A. Res. 35/172, Dec. 15, 1980 (member states must "review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases").

3. The Inter-American Court on Human Rights concurred with this conclusion in OC-16/99, para. 135, Inter-Am. Ct. H.R. (October 1, 1999) ("[s]tates that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases").

4. These rights are guaranteed by international law, separate and apart from constitutional law. These rights, as guaranteed by the ICCPR, are the highest law of the land. They are also guaranteed by customary international law.

CLAIM 138: Petitioner's Right to be Tried Before an Impartial Tribunal was Violated by Death Qualification Procedures.

1. Article 14 of the ICCPR guarantees the right to a "fair and public hearing by a

competent, independent, and impartial tribunal," and the right to be presumed innocent. ICCPR, art. 14(1); (2). In its Implementing Comments, the drafters stressed that Article 14 must be read as broadly as needed to root out the threat to fairness that arises in a particular proceeding. ICCPR, General Comment on Implementation, Para. 5. Also, Article 26 specifically guarantees that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." ICCPR, art. 26. The Human Rights Committee has held that "[t]he right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception." *Gonzales del Rio v. Peru*, No. 263/1987, H.R. Comm. para. 5.2 (1992). Moreover, in *Richards v. Jamaica*, No. 535/1993, H.R. Comm. para. 7.2 (1997), the Committee found a violation of article 14 in a capital case involving extensive pretrial publicity, and ruled that Jamaica could not lawfully carry out the execution. *Id.*

2. The Committee's decision in *Richards* is consistent with the notion that nations must rigorously observe a defendant's fair trial rights in capital cases and may only impose the death penalty where these standards are observed. William Schabas, The Abolition of the Death Penalty in International Law 108-09 (1997).

3. As noted above, the trial judge made disparaging comments regarding the sexual orientation of petitioner and the nature of this case, evidencing considerable bias. Moreover, the "trial judge" was a commissioner who had been assigned to the case. He had not been scrutinized for appointment in the same manner which Superior Court Judges were scrutinized prior to their appointment. Petitioner's guarantee to an independent and impartial tribunal were violated by the service of the commissioner as a trial judge.

4. The jury which convicted and sentenced petitioner was not fairly selected from a fair cross-section of the population and thus was not truly independent and impartial.

5. Petitioner's jury was selected after being "death qualified" pursuant to *Hovey* and *Witherspoon*. This selection process unfairly skewed the jury pool to conviction-

prone and death-prone jurors and resulted in a biased tribunal.

6. Petitioner's jury was subjected to inflammatory and irrelevant evidence. This evidence served to arouse the passions of the jury and made them decide the case based on passion and not a careful weighing of the evidence. The misconduct of the prosecutor further exacerbated this error. The jury which rendered a verdict and sentence was not independent and impartial.

7. The tribunal which heard petitioner's appeal was not impartial. This bias further tainted the already tainted proceedings.

CLAIM 139: Petitioner Has a Right to Litigate Violations of His Rights Before International Tribunals.

1. The United Nations has established committees to monitor the enforcement of the ICCPR and the Torture Convention but the United States does not accept their jurisdiction to hear individual complaints of treaty violations. As a result, individuals in the United States may not petition these committees to hear their individual cases. The United States failure to obey its treaty commitments violates the Constitution, which makes treaties the "Supreme Law of the Land." Customary international law also dictates that the United States accept jurisdiction from the body put in place to monitor and enforce the ICCPR.

2. There are two bodies that address human rights violations in the Americas: the Inter-American Commission of Human Rights and the Inter-American Court on Human Rights. Individuals may file complaints with the Commission alleging violations of human rights set forth in the American Declaration of the Rights and Duties of Man and/or the American Convention on Human Rights. The Commission proceeds slowly and may take years to issue an opinion in any given case. Individuals may also petition the Commission for "precautionary measures," or injunctive relief. In death penalty cases with imminent execution dates, petitioners may request that the Commission issue precautionary

measures that call for a stay of execution. The Commission follows diplomatic protocol and is not a court. When requesting a stay of execution, the Commission will send a letter to the U.S. Secretary of State describing the basis for its request. The State Department must then relay the request to the appropriate state authorities. Petitioner has not yet filed any such complaints, out of respect for the jurisdiction of this Court.

3. The Inter-American Commission also has the power to conduct on-site investigations and hearings.

4. The United States has not accepted the jurisdiction of the Inter-American Court on Human Rights to resolve "contentious cases," or cases in which an individual or country seeks redress for wrongdoing by the United States. As discussed above, this refusal violates both treaty law and customary international law.

5. The Inter-American Court has jurisdiction to issue advisory opinions "regarding the interpretation of the [American] Convention or other treaties concerning the protection of human rights in the American States." American Convention on Human Rights, Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996). On occasion, the United States will appear before the Court in such cases, thereby implicitly accepting the jurisdiction of the Court to issue "advisory opinions." One such case was the opinion issued October 1, 1999, regarding the Vienna Convention on Consular Relations. "The mere fact that the Court has made a pronouncement in an advisory opinion rather than in a contentious case does not diminish the legitimacy or authoritative character of the legal principle enunciated by it." Thomas Buergental, International Human Rights in a Nutshell 220 (2d ed. 1995). The United States should not be free to accept jurisdiction only when it serves its interests.

6. International human rights have been a concern for the countries of the world for years. The United States likes to consider itself a leader in the human rights movement, and is, in fact, one of the most active participants in protecting human dignity and human

rights. The International Covenant on Civil and Political Rights is an important human rights treaty which 138 nations, including the U.S., have ratified. This treaty bestows vital human rights to the citizens of the participating countries.

7. In order to satisfy its obligations under its treaty obligations as well as customary international law, the United States must allow petitioner the opportunity to litigate his claims before the international tribunals charged with monitoring and enforcing his rights. Petitioner has thus far not sought such relief, out of respect for the jurisdiction of this Court. Therefore, petitioner requests that in the event that the Court denies all of petitioner's claims, the stay of execution remain in effect for a sufficient time to allow petitioner to seek relief from the international tribunals discussed above. Alternatively, petitioner asks for a statement from the Court that it will not do so, to be issued forthwith, so that petitioner can seek relief in those tribunals concurrently.

7. CUMULATIVE CLAIMS.

CLAIM 140: Trial Counsel Rendered Ineffective Assistance.

1. Petitioner adopts and incorporates by reference all facts and claims set forth elsewhere in this petition.

2. To the extent that trial counsel failed to raise any of the objections cited herein, it was ineffective assistance of counsel for counsel to fail to do so. It violated petitioner's Sixth Amendment rights to do so. Any failure to object violated the standard of care elucidated in *Strickland v. Washington,* and petitioner was prejudiced by these failures.

3. As discussed above, this ineffective assistance of counsel merits relief. In addition, petitioner should not be penalized for court-appointed counsel's ineffective assistance and each of the claims contained herein should be resolved on its merits.

CLAIM 141: Appellate Counsel Rendered Ineffective Assistance.

1. Petitioner adopts and incorporates by reference all facts and claims set forth

elsewhere in this petition.

2. *Douglas v. California*, 372 U.S. 353 (1963), held that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in state court. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) explained that this right encompasses a right to effective assistance of counsel for all criminal defendants in their first appeal as of right. *See also Coleman v. Thompson*, 501 U.S. 722, 755 (1991).

3. To the extent that the claims were previously available, it was constitutionally ineffective assistance of counsel not to bring these claims during prior proceedings. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error if that error . . . is sufficiently egregious and prejudicial.") As discussed throughout, this ineffective assistance of counsel merits relief.

4. Appellate counsel's failings fell below the generally recognized standard of care and prejudiced petitioner. Claims of ineffective assistance of appellate counsel are reviewed according to the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989). It is reasonably probable that, but for the foregoing deficient performance by appellate counsel, this Court's previous holdings with regard to petitioner's prior claims would have been different.

5. As a result, petitioner was denied his rights to due process, effective assistance of counsel and a fair and reliable sentencing determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. In addition, petitioner should not be penalized for court-appointed counsel's ineffective assistance and each of the claims contained herein should be resolved on its merits.

CLAIM 142: Habeas Counsel Rendered Ineffective Assistance.

1. Petitioner adopts and incorporates by reference all facts and claims set forth

elsewhere in this petition.

2. To the extent any of petitioner's claims were previously available, it was constitutionally ineffective assistance of counsel not to bring these claims during prior proceedings. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error if that error . . . is sufficiently egregious and prejudicial"). As discussed herein, this ineffective assistance of counsel merits relief.

3. To the extent that certain claims could not be raised until habeas proceedings, there must be an exception to the rule of *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) and *Murray v. Giarratano*, 492 U.S. 1, 7 (1989) (plurality opinion) that there is no right to counsel in state collateral proceedings. In those cases where state collateral review is the first place a petitioner can fairly present a challenge to his conviction, the Sixth Amendment right to counsel should apply. *Coleman v. Thompson*, 501 U.S. 722, 755 (1991). This is so because of the state's "'duty . . . to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process,'" and based on the Supreme Court's insistence that "'the merits of *the one and only appeal* an indigent has as of right are [not] decided without benefit of [effective] counsel.'" *Coleman v. Thompson,* 501 U.S. at 756 (emphasis in original)*; see also*, Liebman and Hertz, Federal Habeas Corpus Practice and Procedure, § 26.3b at fn. 36.

4. Petitioner was thus deprived of his right to effective assistance of counsel. This deprivation represents both a separate ground for relief as well as grounds for excusing any potential default.

CLAIM 143: Cumulative Constitutional Error Requires a Reversal of the Convictions and Death Sentence.

1. Petitioner adopts and incorporates by reference all facts and claims set forth elsewhere in this petition.

2. The cumulative effect of the guilt phase errors discussed above requires the reversal of petitioner's convictions. *United States v. Ortega,* 561 F.2d 803 (9th Cir. 1977); *United States v. McLister,* 608 F.2d 785 (9th Cir. 1979). The constitutional errors, taken together, violated petitioner's guarantees of due process, an impartial jury and a reliable capital sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments.

3. Due process entitles a criminal defendant to a trial that conforms with the rules of the jurisdiction in which he is tried. *Evitts v. Lucey,* 469 U.S. 387, 401 (1985); *Hicks v. Oklahoma,* 447 U.S. 343, 346 (1980). The improprieties individually and collectively violated petitioner's right to due process. *Darden v. Wainwright,* 477 U.S. 168 (1986)*; see also Furman v. Georgia,* 408 U.S. 238 (1972).

4. The cumulative effect was to deprive petitioner of a fair penalty phase trial. The death verdict should be reversed.

VIII. PRAYER FOR RELIEF.

WHEREFORE, petitioner respectfully requests that this Court:

1. Issue a writ of habeas corpus to have petitioner brought before it to the end that he might be discharged from his unconstitutional confinement and restraint or relieved of his unconstitutional sentence of death;

2. Stay the trial court's judgment of death until final determination of this petition;

3. Permit petitioner, who is indigent, to proceed without further payment of costs and fees;

4. Grant petitioner funds to secure expert testimony and conduct further investigation as necessary to further prove the facts alleged in this petition;

5. Order respondent to answer why petitioner is not entitled to the relief sought;

6. Order the Office of the Los Angeles County District Attorney to discover all

files pertaining to petitioner's case;

7. Grant petitioner the authority to obtain subpoenas for witnesses and documents which are not obtainable by other means;

8. Grant petitioner the right to conduct discovery including the rights to take depositions, request admissions, and propound interrogatories and the means to preserve the testimony of witnesses;

9. Order an evidentiary hearing at which petitioner will offer this and further proof in support of the allegations herein;

10. Permit petitioner a reasonable opportunity to supplement the petition to include claims that become known as the result of further investigation and information which may hereafter come to light;

11. After full consideration of the issues raised in this petition, vacate the judgment and sentence imposed upon petitioner in Los Angeles County Superior Court Criminal Case No. A445665; and

12. Grant petitioner such further relief as is appropriate and just in the interest of justice.

DATED: May 5, 2004.

Respectfully submitted,
PETER GIANNINI
MATTHEW CAMPBELL
JAMES S. THOMSON
SAOR E. STETLER
Attorneys for Petitioner

By: SAOR E. STETLER

VERIFICATION

I, SAOR E. STETLER, declare under penalty of perjury:

1. I am an attorney admitted to practice law in the State of California. I am representing Mr. Reno, who is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California.

2. I am authorized to file this petition for writ of habeas corpus on Mr. Reno's behalf. I am making this verification because Mr. Reno is incarcerated in Marin County, and because these matters are more within my knowledge than his.

3. I have read the foregoing petition for writ of habeas corpus and know the contents of the petition to be true.

Signed May 5, 2004, at Berkeley, California.

SAOR E. STETLER

In re Reno, CSC
Case No. S004770

PROOF OF SERVICE BY MAIL

I, Saor E. Stetler, declare:

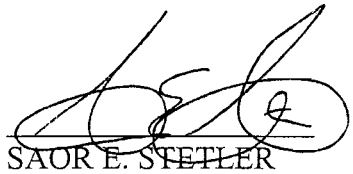
I am employed in the County of Alameda, State of California. I am over the age of eighteen years and am not a party to the within-entitled action. My business address is 819 Delaware Street, Berkeley, California. On May 6, 2004, I served the within **PETITION FOR WRIT OF HABEAS CORPUS** by depositing a true copy thereof in a United States mailbox regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed as follows:

Robert David Breton
Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013

To be Personally Served Upon
Reno within 30 days - -
Notice Will Be Given to the Court
when Service Has Occurred

Peter Giannini
Matthew Campbell
Giannini & Campbell
12304 Santa Monica Blvd. #105
Los Angeles, CA 90025

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on May 6, 2004 at Berkeley, California.



SAOR E. STETLER